The Central Law Journal.

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This issue completes volume thirty-two of the JOURNAL. Our next number will be the usual index to the volume, prepared upon the same plan as heretofore, which we have reason to believe has been entirely satisfactory to our subscribers. It will consist of an index-digest to the principal matter in the JOURNAL and a separate subject-index to the "weekly digests of current opinions."

The March number of the *Medico-Legal Journal* is of especial interest. It contains an excellent paper by Clark Bell, Esq., on "Hypnotism and the Law," and also interesting sketches, accompanied by steel engravings, of the members of the Supreme Courts of Georgia and Alabama. One is impressed with the remarkably youthful countenance of Judge McClellan, of the Alabama court, and, in contrast, the aged and hoary-headed appearance of Chief Justice Bleckley, of the Georgia court. He reminds one of the pictures of "Father Time," lacking the scythe. Both courts are far above the average in point of judicial ability, and some of the members have attained national reputations.

The law pertaining to the disturbance of religious worship will be thoroughly settled by the Supreme Court of North Carolina, if cases of that character continue to multiply in that State as they have of late. There seems to be a sort of an inherent "cussedness" on the part of many of its citizens, which asserts itself in the shape of a fight within close proximity to a "meeting house." In some instances, as in the late case of State v. Kirby, the fight outside possessed greater attractive power than the services within, and the result was a substantial adjournment of the congregation. The court evidently, though not in terms, noted the legal significance of the latter fact, which from a disturbance of worship, apparently changed the affair into a welcome diversion from the dull monotony of prayers.

We think the conclusion of the court that "the congregation was not disturbed by the fuss," was eminently proper.

The practice, on the part of prosecuting attorneys, in their addresses to the jury, of expressing a personal belief or conviction as to the guilt of an accused person, strikes the *Criminal Law Magazine* as grossly improper and in bad taste. The district attorney, it says, is a *quasi*-judicial officer. It is not his duty to convict at all hazards. Nor is his personal belief a matter of any weight or concern. His representative, whether he be an official assistant, or an attorney employed by the prosecutor and conducting the case under the leave of the district attorney, stands in precisely the same relation. The professional sense of the impropriety of such demonstrations, as well as their substantial unfairness, has been quite recently signally rebuked by two courts of great respectability. "It is not proper," says the Supreme Court of Michigan, in People v. Hess, "for the prosecuting attorney to tell the jury that he believes the defendant guilty, as his belief is not evidence in the case." In Raggio v. People, the Supreme Court of Illinois reversed a conviction, in part, upon the ground of his having done so.

We trust that the mild reprimand, recently administered by the United States Supreme Court to the New York circuit court, will be heeded by the judges of other circuits. The first named court, in disposing of the appeals of certain individuals convicted of murder, who have had their execution delayed by repeated stays, intimated that there has been too free a use made of the writ of *habeas corpus* by the New York circuit court, and lays down the rule that where there is no conflict between the State law and the federal jurisprudence the highest State tribunal should determine the points raised, and that any appeal should be direct from the State court to the United States Supreme Court by writ of error. The court said that it was not intended by congress that United States courts

should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the State through their own tribunals.

There is a growing sentiment that there has been for some time an abuse of the right of appeal and of the power to grant stays of proceedings in criminal cases. And many have seriously protested against the unwarranted assumption of power, of late too frequent, on the part of federal courts, which the supreme court here took occasion to rebuke. There is no reform in law procedure more urgent than the doing away with unreasonable delay in the execution of the law as regards criminals.

NOTES OF RECENT DECISIONS.

CARRIERS OF GOODS — RAILROAD COMPANY —WAREHOUSEMEN.—The question in Peoria & P. U. Ry. Co. v. U. S. Rolling Stock Co., 27 N. E. Rep. 59, decided by the Illinois Court, is of considerable interest to railroad companies. It is there held, reversing the appellate court, that a railroad company which receives loaded cars to be transported to a certain side track on its road, there to be unloaded by the consignee of the cargo, and then to be transported by the company to its yard, is not liable for the cars as a common carrier when destroyed by fire while they are standing on the side track to be unloaded. The court distinguishes Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. R. Co., 109 Ill. 135. After citing that case and Mallory v. Ry. Co., 39 Barb. 488; E. St. L. Conn. Ry. Co. v. W. St. L. & P. Ry. Co., 123 Ill. 594; Mo. Pac. Ry. Co. v. Chicago & A. Ry. Co., 25 Fed. Rep. 317, as sustaining the general proposition that a railroad company receiving cars from a connecting line of road for transportation over its line, becomes, in the absence of special contract, a common carrier of the cars, as well as of the freight therein, the court says:

It is manifest that, in determining the question thus raised, it will be necessary to consider the proposition of counsel before quoted; that is, whether the stoppage to discharge the car of its freight, and over which appellant had no control, changed the liability of appellant during such stoppage, although the car, after being unloaded by the consignee of the freight, was to be again taken by the appellant to its yards for storage. It is insisted that Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. R. Co., *supra*, has determined this question favorably to appellee, and it must be conceded to be so, unless that case is distinguishable from the one at bar. It is stated in the opinion of the court in that case that the Chicago, Rock Island & Pacific Railway Company placed upon the transfer track of appellant company a car to be transferred by the latter over its switch track to the Monarch Distillery, consignee of the contents of the car. The car was taken by appellant company, delivered to the consignee on appellant's tracks, and unloaded, and was afterward's taken by appellant, without the knowledge or consent of the Chicago, Rock Island & Pacific Railway Company, to another industry, to be there reloaded, and at which it was destroyed by fire. From the statement thus made it appears that, at the time of the destruction of the car, it had been retaken by the appellant company from the Monarch Distillery, and transported elsewhere to be loaded, without authority of the owner company. It is stated that there was evidence tending to show an understanding among the connecting railroads doing business with appellant, if other shippers desired cars appellant, without any specific order to that effect, was at liberty to place them in position to be loaded, and then return them to the company owning the cars to be shipped, and that such cars were delivered by appellant under the order of the industry at which they were burned; yet that fact seems not to have affected the determination of the cause, and the case was made to turn upon the fact that defendant had exclusive control of the car while on its tracks, and was under obligation to return the same to the owner company when unloaded by the consignee. If the car had been destroyed at the distillery, while there to be unloaded by the consignee of the goods therein, it seems to us that a different question would have arisen; but the defendant assumed control of the car after its freight was discharged, and, instead of returning it to the owner, took it elsewhere, where it was destroyed. It was held in that case that the Chicago, Rock Island & Pacific Railway Company, having parted with the care and control of the car, and having intrusted it to the defendant, could not, at any point on its road, interfere for its safety, and that the duty attached to appellant to return the car to the owner, and it was therefore liable as a common carrier. There was no duty to return the car until delivered at the distillery, and the freight had been unloaded; but such liability arose, if at all, upon appellant's again assuming control of the car to remove it from the distillery. In the case at bar appellant received from the transporting line, appellee's lessee, in the regular course of its business, the cars in question, to be transported over its tracks to the sugar refinery, there to be left standing on appellant's tracks, at the refinery, until unloaded by the consignee of the contents of the car. Having nothing to do with the unloading, and having delivered the cars on the track at the refinery, its whole duty as common carrier of the freight contained in the cars was at an end. The transit of the goods had terminated, and the cars on the track were so far delivered into the control of the refinery as to enable it to discharge the freight. It is not questioned that there was complete delivery of the cars and contents to the refinery in proper time and manner, and at the proper place, for the purposes contemplated; that is, that the refinery company might unload the freight. Appellant had no control of the time such cars should remain at the refinery for such purpose; that, it would seem from the course of business, was in the discretion of the consignee of the freight. While transporting the cars, and in complete,

uninterrupted control of them, appellant was liable as a common carrier for injury to these cars, not caused by the act of God or the public enemy. Mallory v. Railway Co., *supra;* Vermont & M. R. Co. v. Fitchburg R. Co., 14 Allen, 462; Atchison, T. & S. F. Ry. Co. v. Denver & N. O. R. Co., 16 Amer. & Eng. R. Cas., 57; Missouri Pac. Ry. Co. v. Chicago & A. Ry. Co., *supra.*

By the terms of the contract of carriage, the control of the goods ceased absolutely by the delivery to the consignee on the track, and was suspended as to the cars for an indefinite period, the duration of which was to be determined, not by appellant, but by the consignee of the goods. Until the consignee of the goods had unloaded the cars, appellant had no right to remove them, take them to its storage tracks, or other place of safety. The course of business, as well as the contract of appellant with the connecting lines, contemplated that, upon switching the cars to the industries reached by appellant's tracks, the cars were to be permitted to stand upon such tracks, to suit the convenience of the consignees of the goods shipped; and, while the contracting roads undoubtedly might have limited the time for the stoppage of the cars for the purpose of unloading, it does not appear that they did so, or that any custom or usage prevailed that would fix the same. In case of Missouri Pac. Ry. Co. v. Chicago & A. Ry. Co., *supra*, 10 loaded cars were received by the one road for transportation over its lines from the other, and it was held liable for the cars as a common carrier for all injuries occurring while *en route*. But it was held that if destroyed after the carriage had terminated, and there had been a delivery, or a tender to deliver, to the consignee, there was, as to the cars, no liability as a common carrier, and although the cars remained on the tracks of the transporting company, its liability was that of a warehouseman only. In East St. Louis Connecting Ry. Co. v. Wabash, St. L. & P. R. Co., *supra*, the cars, laden with coal, had been delivered to the connecting railway company for delivery to the consignee, and were taken by the latter from the tracks of the connecting company over its private tracks to be discharged of their freight, after which they were to be redelivered to the connecting company, to be returned to the owner. While in possession of the consignee, the cars were burned, and it was insisted that, because the cars were to be returned to the owner company by the connecting railway company, it was liable as common carrier of the cars. The contract of carriage not being complete until the cars were returned to the owner company, it was insisted the liability as a carrier continued. But it was held that as the cars were shoved upon the consignee's private tracks, in conformity with the previous course of business, they had reached their destination, and that consequently the liability as common carrier of them ceased. It is true in that case the cars were placed on the private tracks of consignee and taken a few hundred feet away from the connecting railway company's track to be discharged of their freight; but that cannot, in our opinion, distinguish the case from the one at bar in principle. It was in contemplation of the parties that the car was to be taken to a point upon the railroad, and was there to be delivered to the consignee; and it cannot be important whether the car was taken a few feet off of appellant's tracks, or left standing thereon, in considering whether the liability as insurer continued. In either case, the car had passed from that absolute control of appellant to which it is entitled as a common carrier; and it must be held that when the car and its contents were delivered to the consignee on the switch track of the appellant, at the industry to which they were consigned, the car had reached its destination; and that while the car was under the control of the consignee the liability of the carrier was suspended, to again attach when the car was ready for further transportation to the storage yards of appellant.

CONTRACT— CONSIDERATION — REFRAINING FROM USE OF LIQUOR.—In Hamer v. Sidway, 27 N. E. Rep. 256, the Court of Appeals of New York decide that refraining from the use of liquor and tobacco for a certain time at the request of another, is a sufficient consideration for a promise by the latter to pay a sum of money. Parker, J., says:

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promise, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th ed.) *465. Pollock in his work on Contracts, (page 166), after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his awful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually

proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. See Shadwell v. Shadwell, 9 C. B. (N. S.) 159; Talbott v. Stemmons, 12 S. W. Rep. 297; 29 Cent. L. J. 483. Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249. The cases cited by the defendant on this question are not in point. In Mallory v. Gillett, 21 N. Y. 412; Belknap v. Bender, 75 N. Y. 446; and Berry v. Brown, 107 N. Y 659, 14 N. E. Rep. 289,—the promise was in contravention of that provision of the statute of frauds which declares void all promises to answer for the debts of third persons unless reduced to writing. In Beaumont v. Reeve, Shir Lead. Cas. 7, and Porterfield v. Butler, 47 Miss. 165, the question was whether a moral obligation, furnishes sufficient consideration to uphold a subsequent express promise. In Duvoll v. Wilson, 9 Barb. 487, and Wilbur v. Warren, 104 N. Y. 192, 10 N. E. Rep. 263, the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural live and affection could be enforced. In Vanderbilt v. Schreyer, 91 N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guaranty its payment, which was done. It was held that the guaranty could not be enforced for want of consideration: for in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett, 116 N. Y. 40, 22 N. E. Rep. 224, the court simply held that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract."

LIBEL—PRIVILEGED COMMUNICATION.—The case of Rude v. Nass, 48 N. W. Rep. 555, decided by the Supreme Court of Wisconsin, is instructive upon the question of the interest in the subject of a letter sufficient to constitute the latter a privileged communication, where it might otherwise be libelous. There it appeared that plaintiff had been arrested on the complaint of a father for the seduction of his daughter, and that a third person, on behalf of the father, made inquiries of defendant as to plaintiff's character, whereupon he wrote the letter alleged to be libelous. It was held that the person to whom the letter was sent had such an interest therein that it was not error to instruct that if defendant wrote it in good faith, and without malice, it was a privileged communication. Cassoday, J., says:

The learned counsel on both sides agree to the rule as stated by Folgen, C. J., and held in New York "that it is for the court to determine whether the subject-matter to which the alleged libel relates, the interest in it of the author of it, or his relations to it, are such as to furnish an excuse; but that the question of good faith, belief in the truth of the statement, and the existence of actual malice, remain for the jury." Hamilton v. Eno, 81 N. Y. 122. Under this rule, the question whether the alleged libel was conditionally privileged was, manifestly, a mixed question of law and fact, to be submitted to the jury under the charge of the court. That is what was done in this case. But counsel contend, in effect, that, assuming, as we must, upon the verdict, that the defendant wrote and sent the letter believing it to be true, in good faith, and without malice, yet the circumstances were not such as to make it privileged. They contend that, in order to be privileged, the defendant should have had an interest in the subject-matter of the letter, or some duty to perform in reference thereto, and also that the person to whom it was addressed should have had a corresponding interest or duty; and they cite decisions of learned courts in support of such contention. Some of those decisions, however, are inconsistent with others made by the same courts. In Noonan v. Orton, 32 Wis. 112, Dixon, C. J., approvingly quotes the language of Shaw, C. J., as follows: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no persumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice." Bradley v. Heath, 12 Pick. 164. These cases were cited approvingly in Railway Co. v. Richmond, 73 Tex. 575, 11 S. W. Rep. 555. This alternative statement only makes it necessary that there be an interest or duty on the part of the person making the communication, or on the part of the person to whom it is made, in order that it be conditionally privileged. There are certainly many cases holding that such communication may be conditionally privileged if made to one having an interest in and a right to know and act upon the facts therein stated. Weatherston v. Hawkins, 1 Term. R. 110; Toogood v. Spyring, 1 Cromp. M. & R. 181; Kine v. Sewell, 3 Mees. & W. 297; Robshaw v. Smith, 38 Law T. (N. S.) 423; Waller v. Lock, 45 Law T. (N. S.) 242; Tompson v. Dashwood, L. R. 11 Q. B. Div. 43; Atwill v. Mackintosh, 120 Mass. 177; Sunderlin v. Bradstreet, 46 N. Y. 191; Bacon v. Railroad Co., 66 Mich. 166, 33 N. W. Rep. 181. Thus, in Robshaw v. Smith, *supra*, it was said by Grove, J., speaking for the court: "The defendant did not act as a volunteer, but was applied to for information. When applied to, he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and, *a fortiori*, as it seems to me, to show any letters he had received bearing on the subject. * * * Every one owes it as a duty to his fellow-men to state what he knows about a person, when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained." Lindley, J., was of the same opinion, and said: "I think it would be a lamentable state of the law if, when a person asks another for information, that other could not give such information as he possessed without exposing himself to the risk of an action." Upon a review of the authorities, that case and these expressions were fully sanctioned by Jessel, M. R., in Waller v. Lock,

supra, who went still further, and said: "If the answer is given in the discharge of a moral and social duty, or if the person who gives it believes it to be so, that is enough. It need not even be an answer to an inquiry, but the communication may be a voluntary one. The law is concisely stated by Lord Blackburn * * * thus: 'Where a person is so situated that it becomes right in the interests of society that he should tell to a third person facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication.' It appears to me, that if you ask a question of a person whom you believe to have the means of knowledge about the character of another person with whom you wish to have any dealings whatever, and he answers *bona fide*, that is a privileged communication. I might illustrate this by the instances of inquires being made of a friend or a neighbor about a tradesman, a doctor, or a solicitor. Society could not go on without such inquiries. The whole doctrine of privilege must rest upon the interest and the necessities of society. If every one was open to an action of libel or slander for the answers he might make to such inquiries, it would be very injurious to the interests of society." The eminence of that late learned master of the rolls, who thus expressed the opinion of the court, and the confusion among some of the adjudications, seem to justify the lengthy quotation made. In view of these authorities, and others which might be cited, it seems to us that the father of the girl who made the complaint upon which the plaintiff had been arrested had an interest in the communication sent by the defendant, and had the right to know and act upon the facts therein stated; and hence, had the letter been written by the defendant in answer to inquiries made by the father personally, it would have been conditionally privileged. The mere fact that the letter was written by the defendant in answer to inquiries made by another for and in behalf of the father does not take away the privileged character of the communication. This is manifest from some of the authorities cited.

SEDUCTION—WHAT CONSTITUTES—DAMAGES—RIGHTS OF FATHER.—Two interesting seduction cases have recently been reported—Putnam v. State, 16 S. W. Rep. 97, decided by the Texas Court of Appeals, and Simpson v. Grayson, 16 S. W. Rep. 4, decided by the Arkansas court. In the Texas case it was held that to constitute seduction a man must, in addition to the promise of marriage, use some other means than a mere appeal to the lust or passion of the woman. The court says:

"Generally, in order to establish the charge of seduction, it must be made to appear that the intercourse was accomplished by some artifice or deception; and it is held that something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for the crime." State v. Fitzgerald, 63 Iowa, 268, 19 N. W. Rep. 202. Our statute expressly provides that the seduction must be accomplished by means of a "promise to marry." As was said in People v. De Fore, 64 Mich. 693, 31 N. W. Rep. 585: "Under this statute the offense is committed if the man has carnal intercourse, to which the woman assented, if such assent was obtained by a promise of marriage, made by the man at the time, and to which, without such promise, she would not have yielded. People v. Millspaugh, 11 Mich. 278. The offense consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse, by promises made at the time. * * * The promise, and yielding her virtue in consequence thereof, is the gist of the offense. If she resists, but finally assents or yields, induced thereto or in reliance upon the promise made, the offense is committed." Boyce v. People, 55 N. Y. 644. Mr. Bishop, in his work on Statutory Crimes (section 638, 2d ed.), says: "Though the parties are already under marriage engagement, if the woman yields, not by reason of the man's promise of marriage, but simply for the gratification of a criminal desire, he does not commit the offense; yet the substance of the engagement does not render his act less a crime if she submits from reliance thereon." In the words of Bleckley, J., (Wilson v. State, 58 Ga. 328): "To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards undo her under a solemn repetition of the engagement vow, is to employ persuasion as well as promises of marriage." Under a statute quite similar to ours, where the language of the statute was, "If any person, under promise of marriage, seduce and debauch any unmarried female," etc., the Supreme Court of Missouri, in an able opinion by Sherwood, J., say: "There are two steps necessary to be taken in order to consummate the crime under discussion: *First*, the female must be seduced, that is, corrupted, deceived, drawn aside from the path of virtue, which she was pursuing, her affections must be gained, her mind and thoughts polluted; and, *second*, in order to complete the offense, she must be debauched, that is, she must be carnally known, before the guilty agent becomes amenable to human laws. Thus it may be seen that a female may be seduced without being debauched, or debauched without being seduced. * * * A similar view of the proper construction of a statute substantially identical with our own was taken in Pennsylvania in Com. v. McCarty, 2 Clark, 135, and cited with approval in State v. Patterson, 88 Mo. 88." State v. Reeves, 97 Mo. 668, 10 S. W. Rep. 841. In State v. Patterson, *supra*, we find a definition of the statutory word "seduce" which commends itself to our minds as eminently correct. It is as follows: "The word 'seduce,' though a general term, and having a variety of meanings, according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a woman, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to surrender her chastity by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated." Citing State v. Bierce, 27 Conn. 319; Dinkey v. Com., 17 Pa. St. 127. As is pertinently said in State v. Reeves, *supra:* "No one can, with any degree of plausibility, contend that a virtuous female can be seduced without any of those arts, wiles and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in præsenti*, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. This is hire or salary, not seduction." In his charge to the jury in the case in hand the learned trial judge did not sufficiently submit to the jury the law of seduction, as it is well settled and established, in accordance with the

principles above announced. There was no explanation whatever of the legal term "seduction."

In the Arkansas case it was held that as long as a father retains his right to control the services of his infant daughter he can sue for her seduction, though he has allowed her to receive her earnings in the service of the one by whom she had been seduced, and that evidence of previous incontinence goes in mitigation of damages only, and does not limit the recovery to the loss of services and expenses, unless she had been notoriously unchaste, and had disgraced her family to such an extent that the defendant's conduct added nothing to her parents' suffering, nor to the danger of corrupting the family's morals.

NATURE OF SECURITIES UPON WHICH TRUST INVESTMENTS MAY BE MADE.

The general liability of trustees in the care and administration of funds committed to their charge is well understood. And though many rules have been laid down for the guidance of trustees, all of them may be summed up in this, that trustees are bound to take the same care of trust property as a man of ordinary caution would take of his own, and that they are not insurers.[1] In the matter of investments it is to be said, in the first place, that it is the duty of trustees empowered to invest trust money, to use due diligence to so invest them and to keep them invested. If they retain them beyond a reasonable time (six months being usually allowed), they are *prima facie* liable for interest, and the burden is upon them, upon an accounting, to explain or justify the delay.[2] The object of an investment, it must be borne in mind, is not only to secure the property, but to obtain an immediate income from it. Therefore, a trustee empowered to invest moneys in "any property, real or personal, that he may see fit," is not justified even in making an investment in the stock of a manufacturing company, the works of which are unfinished and the stock not paid up in cash.[3] Where the statutes, as in some States, require investments in certain securities, the trustee, of course, is liable for failure to comply strictly therewith, unless absolved by the terms of the trust investment. And therefore, in what shall follow herein, we shall not have in view statutory provisions, but will consider the questions presented simply from a common law standpoint.

When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment his discretion must be exercised with the same diligence and care that a prudent man would bestow on his own concerns. He must act in good faith, use sound discretion, and select such securities as a court would approve. If, having exercised a sound discretion, he makes an investment in good faith, and the security is lost without any neglect on his part, the loss is not his.[4] It is not to be understood, however, that wherever loss ensues from the investment of the trustee, he will be excused by showing that persons of care and prudence in the management of their own affairs made investments of the same character and were disappointed in the result. A prudent man dealing with his own means might employ them in speculations promising large gains, or loan them on personal security, or invest in the stock of railroad companies or other private corporations. If a trustee, however, so loan or engage in such enterprise at the expense of the interests committed to his charge, he could not claim excuse by pointing to the course of individuals noted for their prudence, by whose example he had been misled. The principle which is to be extracted from the cases consists with what is said in Hovenden on Frauds, 486: "He is bound to manage the property for the benefit of the *cestui que trust* with the care and diligence of a prudent man." What will constitute the care and diligence thus exacted will depend on the attending circumstances. If the act in itself was an uncautious and imprudent one, it will not be sustained; and no aid derived from the fact that the trustee was countenanced in it by the participation of

[1] 4 Lawson's Rights and Remedies, § 2028; Campbell v. Miller, 38 Ga. 304; Hun v. Cary, 82 N. Y. 65; King v. King, 37 Ga. 205; Lovett v. Thomas, 81 Va. 245; Finlay v. Merriman, 39 Tex. 56; Morrow v. Saline County, 21 Kan. 484; Neff's Appeal, 57 Pa. St. 91.

[2] Lent v. Howard, 89 N. Y. 169; Barney v. Saunders, 16 How. 535.

[3] Gray's Appeal, 34 Pa. St. 100.

[4] Cromie v. Bull, 81 Ky. 646.

prudent men will give it sanction or support.[5] And where money is bequeathed to a trustee "to be invested and improved according to his best judgment," it is his duty to invest it in safe securities, and his discretion in the selection of investments is not enlarged by the words "according to his best skill and judgment."[6]

An absolute and abstract rule for the protection of trustees in making investments cannot, of course, be laid down. What might be safe in one instance might not be in another. The trustee has not, in this country, the advantage of a precise standing rule which has been long since adopted by the English courts, indicating particular securities as safe ones, in the choice of which the trustee will be protected against all losses. But, on the other hand, he is supposed to have the benefit of a somewhat more lenient rule pursued by our courts generally, in revising his faithful but unfortunate proceedings. As a general proposition, it is not considered sound discretion in a trustee to invest in mere personal security.[7] Even power to invest upon "any securities" is not in England sufficient to justify the trustee in accepting personal securities.[8] And though the South Carolina court authorizes such an investment, they say it is only permissible where real estate security cannot with reasonable diligence be procured, and that where personal security is taken it will devolve upon the trustee to make the necessity and propriety of such investment appear upon an accounting.[9] The Supreme Court of New Hampshire also holds that the rule that a trustee cannot in any case invest funds in his hands upon personal security has not been adopted in that State.[10]

In England it has been held for more than a century past to be settled law that a trustee can only protect himself from risk when he invests the trust fund in real or government securities, or makes the investment in pursuance of an order by the court. The same rule has been adopted in its whole length and breadth by the courts of New York and New Jersey.[11] In the earlier Pennsylvania cases the doctrine does not appear to have been affirmed or denied.[12] But in a later case the supreme court, looking upon the question as an open one, claimed that the time had come when the interests and rights of trustees, as well as *cestuis que trust*, demanded the settling of it, and that the rule "ought to be as it is elsewhere, not because we feel bound by the precedents of a foreign State, but because we cannot resist the consideration of justice and policy by which they are supported;" and they held that a trustee, in making investments, can protect himself from risk only by investing the trust fund in real or government securities, or by making the investment in pursuance of an order of court.[13] Such also seems to be the conclusion of the Indiana court.[14] And in South Carolina personal securities, in contradistinction to public or real securities, can only be upheld as proper subjects for the investment of trust funds under special circumstances which ought to be made to appear by the trustee.[15] The rule has been repudiated in

[5] Mayer v. Mordecai, 1 S. C. 383.

[6] Kimball v. Reding, 31 N. H. 352.

[7] Moore v. Hamilton, 4 Fla. 112; Dufford v. Smith (N. J.), 18 Atl Rep. 1052; Gray v. Fox, 1 N. J. Eq. 259; Harding v. Larned, 4 Allen, 426; Clarke v. Garfield, 1 Allen, 427; Ormiston v. Olcott, 84 N. Y. 339; King v. Talbot, 40 N. Y. 76.

[8] Lewis v. Nobbs, 8 Ch. Div. 591.

[9] Nance v. Nance, 1 S. C. 209.

[10] Knowlton v. Bradley, 17 N. H. 458.

[11] Gray v. Fox, 1 N. J. Eq. 259; Ackerman v. Emott, 4 Barb. 626; Tucker v. Tucker, 33 N. J. Eq. 235. In Mills v. Hoffman, 33 Hun, 594, the court says: "It is the duty of trustees to invest funds held by them in government or State securities, or in bonds and mortgages on unincumbered real estate. While this rule is not arbitrary and inflexible so as to admit of no possible exceptions, it is the basis upon which trustees should usually act." In Adair v. Brimmer, 74 N. Y. 539, the court says that "the security, though technically real estate, was of the most speculative character, an undeveloped coal mine, requiring a large outlay to make it available, and, although it had at the time a market value, it was sought for by purchasers with a view of being used, and its value consisted in being available to carry on the mining business, which the testimony shows was of the most hazardous and uncertain nature. Oil lands at one time commanded enormous prices, but although they were real estate, no one would pretend that they would constitute a suitable basis for the investment of trust funds as a real estate investment."

[12] In Nyce's Estate, 5 Watts & S. 254, the trustee was charged with money lost by an investment in bank stock, but there were other reasons for it besides the nature of the investment. In Luken's Appeal, 7 W. & Ser. 48, a guardian was held responsible for a lease in Girard bank stock, but in that case there was a manifest want of good faith. In Twaddell's Appeal, 5 Barr. 15, the court gave the accountant the credit for Lehigh loan stock under pecular circumstances, and because the company held real estate of much value.

[13] Hemphill's Appeal, 18 Pa. St. 303.

[14] Tucker v. The State, 72 Ind. 242.

[15] Allen v. Gaillard, 1 S. C. 279.

Massachusetts,[16] and in Rhode Island,[17] trustees there being only required to be prudent in investments, having regard to the permanent disposition, the income and the safety of the trust fund.

In the leading case in Massachusetts,[18] the testator directed his trustees to lend the trust fund upon ample and sufficient security, "or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds, and in the punctual collection of the dividends, interests and profits thereof, and authorizing them to sell out, reinvest and change the said loans and stock from time to time as the safety and interest of said trust fund may in their judgment require." The court, in a thoroughly considered opinion delivered by Mr. Justice Putnam, held that the trustees were authorized to invest in stocks of manufacturing corporations or incorporated insurance companies; and after observing that the English rule, which requires trustees to invest in public funds, had never been recognized here, laid down this general rule: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested." The rule thus judicially declared over a century ago, has been since constantly adhered to in that commonwealth, and has been applied to cases in which the terms of the trust contained no special provisions upon the subject.[19]

In a comparatively recent case,[20] a testator, by his will, directed his executors to "use their own judgment as to investing the moneys arising from my estate; at the same time, I would recommend to them the propriety of keeping at least one-half of the same invested on mortgage of unincumbered real estate, as I think well of that kind of security." When a trustee of the estate was afterwards appointed, more than one-half of the trust fund was invested in United States bonds, and none of it in mortgages of real estate. The trustee, who had had experience in making investments for himself and others, including banks, in which he was an officer, sold the United States bonds and invested the greater part of the proceeds in railroad bonds at 85 per cent. of their par value, and in a promissory note of an individual secured by pledge of twice its amount of such bonds, after having advised with various persons reputed of good judgment in financial matters, and after having himself made careful inquiries and investigations, the result of which was to satisfy his mind that the investments were safe and prudent ones at the time, and were proper for him to make in his capacity as trustee. It was held that the trustee acted with the sound discretion that the law required of him, and should not be charged with the loss.[21]

The question whether a mortgage on real estate incumbered by prior liens is a safe investment has engaged the attention of some courts. In Mills v. Hoffman[22] it was said: "From our examination of the authorities and the cases referred to, we have come to the conclusion that as a general rule, it is the duty of trustees to invest funds held by them in government or State securities, or in bonds and mortgages on unincumbered real estate." It is said in one case,[23] that "the right of an agent to advance money on a security not of the first class may well be questioned," and that a second mortgage is not a "first class investment." In Gilmore v. Tuttle,[24] the general doctrine that investments in second mortgages are not proper

[16] Harvard College v. Amory, 9 Pick. 446; Brown v. French, 125 Mass. 410.

[17] Peckham v. Newton, 15 R. I. 321.

[18] Harvard College v. Amory, 9 Pick. 446.

[19] Lovell v. Minot, 20 Pick. 116; Kinmonth v. Brigham, 5 Allen, 270; Clark v. Garfield, 8 Allen, 427.

[20] Brown v. French, 125 Mass. 410.

[21] The court remarked that "if a more strict and precise rule should be deemed expedient, it must be enacted by the legislature. It cannot be introduced by judicial decision without working great hardship and injustice. In the case before us the testator expressly gave his trustees the largest discretion to use their own judgment as to investing the trust fund. While he recommended to them the propriety of keeping at least one-half thereof invested on mortgage of real estate, he did not think to do so, and in fact no part of the fund was so invested at the time of the appellant's appointment."

[22] 26 Hun, 594.

[23] Whitney v. Martin, 88 N. Y. 535.

[24] 32 N. J. Eq. 611.

ones is recognized, and a trustee was held liable for loss resulting from such an investment. That case is a strong one, for the deed of trust contained a provision that the trustee should only be liable "for his own willful and intentional breach of the trust." In an English case,[25] the Master of the Rolls said: "I beg, however, that it may not be understood that I sanction the propriety of trustees lending money on a second mortgage when they do not get the legal estate." In a late Indiana case[26] it was held that a lending of money of a trust estate upon the security of a second mortgage is not a proper and prudent investment of trust funds, and will not meet the approval of a court of equity. A late New Jersey case holds that where a clause in an instrument creating a trust, exempts the trustee from liability except for willful and intentional breaches of trust, the trustee is not exempted from liability for losses arising from his having made sales or investments without instituting proper inquiries and exercising a reasonable judgment in respect to the value of securities received, nor for losses arising from investments of trust funds in second mortgages, where no circumstances are shown to justify a resort to such hazardous securities. The fact that the trustee neither made nor intended to make any personal gain from his acts does not exonerate him from liability under that clause.[27] And in one, still more recent,[28] it is said that "where an investment has been made on second mortgage, and it has not been ascertained and does not appear that there will be a loss, a mere fact that it was an investment on second mortgage will not of itself make a trustee chargeable with the money. The prior incumbrance may be comparatively insignficant, or if not, it may be of an amount not so large as to endanger the security." It has been held that a bank stock is not a proper investment,[29] nor stock of the bank of the United States.[30] In a Massachusetts case, however, it was held that the purchase by a trustee with the trust funds in good faith of a certificate of deposit payable at a future day, issued by a national bank, the stock of which was selling at par, and occasionally at a small premium, and which was issuing large numbers of such certificates to individuals, savings banks and trust companies, is not such an imprudent investment of the trust fund as will make a trustee liable for the loss arising from the failure of the bank before the day stipulated for the payment of the certificate.[31] Even municipal bonds have been held not a proper investment without authority from a competent court.[32] A loan to a mere private manufacturing corporation on personal security is not sanctioned,[33] though investments in stocks of incorporated manufacturing companies, and of insurance companies were approved by the Massachusetts court.[34] A trustee was held liable for an investment in stock of a navigation company when in good credit and paying large dividends for a long time subsequent; where it was common for other trustees to invest in such stock, and for others to use it as a permanent and safe investment, and where the guardian had invested his own funds in the same manner, and though the stock continued to pay large dividends and be in good credit for some years after the investment, and some of the wards who received the stock on attaining their majority had realized a large profit on the investment of their share of the funds.[35] If a trustee's authority enables him to invest in stocks they should appear to have been at the time productive, and to have had a market value, depending upon their income and not upon contingen-

[25] Norris v. Wright, 14 Beav. 28.

[26] Shuey v. Latta, 17 Cent. L. J. 353.

[27] Tuttle v. Gilmore, 36 N. J. Eq. 617.

[28] Sherman v. Lanier, 39 N. J. Eq. 255.

[29] Gilbert v. Welsch, 75 Ind. 557; Ackerman v. Emott, 4 Barb. 526; Tucker v. Tucker, 33 N. J. Eq. 235.

[30] Nyce's Estate, 5 Watts & S. 254; Hemphill's Appeal, 18 Pa. St. 303.

[31] *In re* William P. Hunt, 141 Mass. 515.

[32] Tucker v. Tucker, 33 N. J. Eq. 235; Trustees v Clay, 2 B. Mon. 385.

[33] Simmons v. Oliver (Wis.), 43 N. W. Rep. 561.

[34] Harvard College v. Amory, 9 Pick. 446; Lovell v. Minot, 20 Pick. 116. In this case the court says: "The rule claimed by the appellant, that no investment can be considered safe or can be approved by a probate court of equity except in public securities, however well supported by authorities as a rule established in English courts of equity, is wholly inapplicable to this country and untenable. In fact there are no public securities in this country which would answer thi requisition of an English court of equity. The rule was well laid down in Harvard College v. Amory, Pick. 446, that 'all that can be required in such cases is that the trustee shall conduct himself faithfully and exercise sound discretion;' and by this rule the court are of opinion that the present case must be governed."

[35] Worrall's Appeal, 9 Pa. St. 508.

cies. Shares in a contemplated railroad are not such.[36]

An executor cannot invest funds of the estate in a patent right, and in the business of manufacturing a patented article.[37] In one case it was held that the trustee committed breach of trust in receiving payment of bonds in confederate treasury notes, and investing the proceeds in bonds of the confederate States, and that he was liable to account to the *cestuis que trust* for the sum received.[38] Where the testator authorized his trustees "at any time when they should deem it proper to do so, to sell, lease, mortgage or convey all or any portion of said property, execute any assignment and invest and reinvest the same in such a manner and such securities as to them shall seem advisable," it was held that the trustees exceeded their authority by investing in railroad bonds, the same not being securities for permanent investment, and the parties interested can hold them for any loss by depreciation of the investment.[39] But a trustee under a will who in good faith and in the exercise of a sound discretion, decides to retain an investment made by the testator in stock of a railroad corporation when it is gradually falling in value in the market, is not responsible for the depreciation, although the stock becomes worthless.[40] In all these cases, where the investment is left largely to the discretion of the trustee, it may be said that safety is the primary object to be secured in an investment of this kind, and the trustee is not chargeable with an income that cannot be realized without hazard to the fund. An investment is not to be deemed safe without evidence that it is so, and the trustee ought to be able to point out some ruling feature to distinguish it from a mere adventure. If he invests in property, it ought to be property which yields an actual income, and which has a valuation in the general sense of the community founded on that income, and not upon remote eventualities and a succession of contingencies. If his discretion under the trust extends to the buying of stocks at all, his purchases should be limited to such as have a value in market based upon a regular income, or at least upon an income that upon an average for a considerable period may fairly be deemed equivalent.[41] A trustee is required to give to the business of the trust his disinterested zeal, skill and attention, and is bound to do no act that will bring his individual interests in conflict with those of the *cestui que trust*. He must not allow his individual interests to directly or indirectly influence him adversely, and all that he does in the execution of the trust must be for the promotion of the interests of the beneficiary. Investments of trust funds must be made with a view to the good of the beneficiary and for no other purpose. They must not be made to favor friends nor to promote individual interests; but they must be made so that the full benefit shall go where the creator of the trust directed.

LYNE S. METCALFE, JR.

St. Louis.

[36] Kimball v. Reding, 31 N. H. 352.
[37] Trull v. Trull, 13 Allen, 407.
[38] Mayer v. Mordecai, 1 S. C. 383.
[39] *In re* Keteltas' Estate, 6 N. Y. Supp. 668; Adair v. Brimmer, 74 N. Y. 539.
[40] Bowker v. Pierce, 130 Mass. 262.
[41] Kimball v. Reding, 31 N. H. 352.

HANDWRITING—COMPETENCY OF WITNESS.

NELMS V. STATE.

Supreme Court of Alabama, April 16, 1891.

One who is not an expert on handwriting, and testifies that he did not know defendant's handwriting; that he had seen him write but once, and that he had seen but that one writing that he knew to be defendant's; that he was not familiar with defendant's handwriting, and could not say whether the note or order under consideration was in defendant's handwriting—is not competent to give an opinion as to such writing.

The defendant in this case was indicted for the forgery of a written instrument, which was written on a blank form headed "Office of J. G. Guice & Bro., Cotton Brokers and Commission Merchants, Eufaula, Ala.," and in these words: "Mr. Parker: Pay this boy $1.00 for me." [Signed] Miss Susie Guice." On the trial, as the bill of exceptions shows, C. W. Guice, who was a partner of the firm of Guice & Bro., and who had sued out the warrant for the arrest of the defendant, testified that his wife was named Susie Guice, and that neither the writing nor the signature to it were her handwriting; that the writing was presented to him, on the day he sued out the warrant, by Mr. Henry Parker, a merchant in Eufaula, who was accompanied by a little negro boy named Patty; and there was other evidence showing that the defendant, who was employed in the office of Guice & Bro., had given the writing to the boy, and promised to give him a part of the money if he got it. Said Guice further testi-

fied that when Mr. Parker presented the order to him "he requested the defendant to write a few lines for him, and defendant did so; that this was all of the defendant's writing he had ever seen; that he did not know the defendant's handwriting, had never seen him write but that once, and had never seen but that one writing that he knew to be his; that he was not familiar with and did not know defendant's handwriting, and could not say whether said note or order was was in his handwriting." On this evidence the court allowed the witness to testify, against the objection of the defendant, "that in his opinion said note or order, both in its body and signature, was in the handwriting of the defendant;" and to this ruling the defendant excepted.

COLEMAN, J.: The defendant was indicted, tried, and convicted of forgery. The instrument alleged to have been forged is described as follows: "Mr. Parker: Pay this boy $1.00 for me. [Signed] Miss Susie Guice." But one question is presented by the bill of exceptions, and that is as to the competency of the testimony of the witness C. W. Guice, the husband of Susie Guice, to show that the written instrument was in the handwriting of defendant. Persons who are acquainted with or have some knowledge of another's handwriting, whether acquired by having seen the party write or other legal way, are competent to testify and give an opinion as to the genuineness of the signature. Experts may go further, and institute a comparison between writings admitted to be genuine and those disputed, and give an opinion. A witness need not be familiar with another's handwriting to render him competent. On the other hand, not every person who has seen another write is competent to testify or give an opinion as to the genuineness of the signature. In the course of a busy life one may see many persons write, in many instances merely casually, the recollection of which is entirely effaced from the memory, as much so as if he had never seen the writing. In such cases the witness is not competent to give an opinion, merely because he may remember, or that it may be shown, that he has seen the person write. Not being an expert, in order to make a witness competent to give an opinion as to the genuineness of a writing he must be able to say that he has some knowledge or acquaintance with the handwriting of the person, or believes he has such knowledge or acquaintanceship, acquired by seeing him write many times, or once, or in some other legal way. The extent of his knowledge or familiarity with the handwriting in question enters into the weight of his testimony, but does not affect its competency. In the case of State v. Givens, 5 Ala. 754, it was declared that "a witness required to testify upon the subject must possess a previous knowledge, acquired by having seen the party write, or in some other legal manner." In the case of Hopper v. Asbley, 15 Ala. 465, the witness answered "that he had seen the plaintiff write once, but he did not know his handwriting." The court informed the witness "that he was not required to swear positively as to the writing, but if, from having seen the plaintiff write once or oftener, he believed he was acquainted with his handwriting, or would recognize it, then he was competent, and bound to give his opinion." Here the witness was held incompetent. The case of Moon v. Crowder, 72 Ala. 88, relied on by the prosecution, does not militate against these authorities. The declaration "that a witness who has seen the party write may express his opinion" referred to the facts of the case, which appeared in the record, though not reported in the opinion, and which tended to show a previous knowledge of the handwriting, acquired by having seen the party write. The more recent case of Griffin v. State (Ala.), 8 South. Rep. 670, fully declared the same rule as to the competency of a witness to give an opinion upon handwriting. The witness Guice testified "that he did not know the defendant's handwriting; that he had seen him write but once, and that he had seen but that one writing that he knew to be defendant's; that witness was not familiar with and did not know the defendant's handwriting, and could not say whether the said note or order was in the handwriting of the defendant." Without more this is not sufficient to render the witness competent to give an opinion Possibly, if the witness had been instructed as to the extent of knowledge or acquaintanceship with the handwriting necessary and applying in such case, as explained in the case of Hopper v. Ashley, *supra*, the knowledge of the witness was sufficient to bring him within the rule, but as it appears in the record the objection should have been sustained. Reversed and remanded.

NOTE.— *Non-Professional Witness as to Handwriting.*—Prof. Rogers, in his very valuable work on Expert Testimony, 2d edition, § 122, states that the testimony of non-professional witnesses is admissible to prove handwriting in five classes of cases, and these, we believe, to be the only cases where such testimony is admissible: 1st. When the genuineness of the handwriting is in issue, the belief of any person is admissible who has seen the person write whose writing is the subject of dispute. Miles v. Loomis, 75 N. Y. 288; Bell v. Brewster, 44 Ohio St. 690; State v. Gay, 94 N. C. 814; State v. Stair, 87 Mo. 268; Long v. Little, 119 Ill. 600; Hopper v. Ashley, 15 Ala. 463; Moone v. Crowder, 72 Ala. 79; State v. Thompson, 80 Me. 194; Woodman v. Dana, 52 Me. 9; National Bank v. Armstrong, 66 Md. 113. And the belief of such a witness is admissible, although he may have seen the person, whose writing is in question, write but once (Horn Tooke's Case, 25 How. St. Tr. 71; Edelen v. Gough, 8 Gill (Md.), 87; Rediont v. Newton, 17 N. H. 71; Vinton v. Peck, 14 Mich. 287; Pepper v. Barnett, 29 Gratt. (Va.) 405; State v. Scott, 45 Mo. 302); and that ten years (Warren v. Anderson, 8 Scott, 384), or twelve years before. Brachman v. Hall, 1 Disney, 539. The opinion of a witness who had never seen the person write for nineteen years has been received. Horn Tooke's Case, 25 How. St. Tr. 71. So has the opinion of a witness who had never seen the party in question write anything but his name. Garrells v. Alexander, 4 Esp. 37. As is said in one of the cases, "the law has

fixed no limit to the measure of human capacity," and therefore will not undertake to define any specific number of times the witness must have seen the party write or the limit of time within which the handwriting must have been seen by the witness. If the witness has ever seen the party write, and from the exemplar in his mind can form an opinion as to the genuineness of the signature, his opinion will be admissible for what it is worth. While the competency of the witness is not affected by the lack of frequency of observation, or the length of time which may have elapsed since the writing was seen, the weight to be attached to the testimony will necessarily much depend on these circumstances. Miles v. Loomis, 75 N. Y. 288. 2d. But it is not in all cases necessary that the witness should have seen the party write, to enable him to identify the disputed writing. The opinion of a witness may be received who has never seen the party write, if he has received letters from him in answer to letters written by the witness, or under his direction, and addressed to the person whose writing is in question. Gould v. Jones, 1 W. Bl. 384; Parsons v. McDaniel, 62 Ga. 100; Southern Express Co. v. Thornton, 41 Miss. 216; Atlantic Insurance Co. v. Manning, 3 Colo. 228; Empire Manuf. Co. v. Stewart, 46 Mich. 482; Thomas v. State, 103 Ind. 419; Hall v. Van Vraken, 28 Hun, 403. It is, of course, possible that the correspondence may have been written by some other person by the authority of the party whose name is used, but, as ordinarily persons write their own letters, unless the letters indicate the contrary, the courts have established the principle that a witness who has never seen the party write is competent to testify if he has, through correspondence, acquired a knowledge of such party's handwriting. Rogers on Exp. Test., *supra*. 3d. The opinion of a person is admissible, although he may never have seen the person write whose signature is in dispute, nor received letters from him in reply to letters written by himself, provided, writings purporting to have been written by such person have passed through the hands of the witness in the ordinary course of business. Thus Lord Denman has said: "The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write nor received a letter from me." Mudd v. Luckermore, 5 Ad. & Ell. 703. 4th. Likewise the opinion of a witness can be received when he has seen a signature which the person whose signature is disputed has acknowledged to be his. Hammond v. Varian, 54 N. Y. 398; Gordon v. Price, 10 Ired. (N. C.) 388. And in a recent case in North Carolina a witness was allowed to testify as to the handwriting of his uncle, he having seen many letters purporting to come from him to the father of witness, about family matters or family business, concerning which no one else was familiar. Tuttle v. Rainey, 98 N. C. 513. 5th. Moreover, a person is competent to express an opinion concerning the genuineness of a signature when the witness at the time of holding an official position has, in the performance of his duties, become acquainted with the signature or writing of the person whose signature is in dispute. Yates v. Yates, 76 N. C. 142; Goddard v. Glominger, 5 Watts, 209; Dungan v. Beard, 2 N. & M. 400; Doe v. Roe, 31 Ga. 599; Sill v. Reese, 47 Cal. 343; Amherst Bank v. Root, 2 Met. 523. Thus the signature of a justice of the peace may be proved by another public officer who has seen it as a certificate on papers filed in his office. Rogers v. Ritter, 12 Wall. 317.

Where the knowledge of an ordinary witness as to the handwriting of a person whose signature is the subject of dispute, is acquired after the disputed signature is alleged to have been made, the witness may be incompetent to testify on the knowledge so acquired. Thus in an early English case, Lord Kenyon rejected the evidence of a witness who stated that he had seen defendant write his name several times before the trial, he having written it in order to show the witness his true manner of writing, so that the witness might be able to distinguish it from his alleged signature. Stranger v. Searle, 1 Esp. 14. The reason was the possibility that the defendant intentionally disguised his hand, and in a case decided a few years since in Illinois, a witness who had no acquaintance with the handwriting of the party until after a particular signature was denied, and who then examined such person's report as guardian filed in the county court, and the signature thereto, was held not competent to express an opinion as to the genuineness of the signature in dispute. Board of Trustees v. Misenheimer, 78 Ill. 22. And see Snyder v. McKeever, 10 Brad. (Ill.) 190; Reese v. Reese, 90 Penn. 89. For an interesting discussion of the subject of admissibility of the testimony of experts in handwriting, see Rogers on Expert Testimony, 2d ed., chap. 7.

JETSAM AND FLOTSAM.

ADVICE TO YOUNG LAWYERS.—The advice of Ex-President Cleveland to young lawyers might be read with profit by many of them. He says: "If I were to tender any advice to young men in the legal profession or contemplating such a career, I think I could not refrain from asking them to dismiss from their minds the idea that the practice of the law is made up in an important degree of oratory and eloquent addresses before courts and juries. No one should enter this profession who is not prepared to do very hard, continuous, and often irksome work. I shall follow this advice by saying that there is no mistake about another fact, to-wit: In the practice of law, as in everything else, honesty and frank, fair dealing is not only enjoined by good morals, but is the best policy. It is a delusion to suppose that the noble profession of the law can be faithfully pursued or successfully practiced by trickery and overreaching subterfuges."

CANADIAN METHODS OF COLLECTING. — The "Union Credit and Protective Association" of Canada, a collection agency, and which claims to have been established to "afford protection in giving credit and to prevent those who refuse to pay legitimate debts from obtaining credit from members of the association," seems from its methods, to proceed upon the idea that all debtors are necessarily dishonest and seek to avoid payment of just obligations. As a consequence it resorts to a form of persuasion, which, in America, would be called "blackmail," but which the character of Canadian debtors may render necessary and effective. I have before me a circular sent to a reputable and responsible citizen, against whom it has, to say the least, a disputed claim, which reads: "You have not responded, as we have as yet heard, and we would like to ask you a question. If you do not pay your honest bills and just debts, but can do so and do not, would you like to have your name posted in your Grocery, Druggist, Dry Goods, Clothing, Boot and Shoe, Hardware, Butcher, Coal and Wood dealers and Milkmen's as a person or persons that do not pay their honest debts, and make a living off honest people throughout the Dominion of Canada

and the United States of America? Our advice would be to adjust this claim and save your credit and name. If it is not paid within the specified time, which is ten or fifteen days from the date of this letter, or state your reasons why, wouldn't it be our duty to send it to the press as above stated, for the protection of merchants and professional men?"

I am informed that as a matter of fact the gentleman threatened has repeatedly written them the "reason why," and has given them full opportunity to test the question in the courts.

Such methods of collection are outrageous, and should be discountenanced by reputable attorneys and collectors everywhere. It is not only unwarranted to assume that all debtors are "dead beats," but, on the contrary, I think that the majority of them desire to pay. Though I believe in the vigorous enforcement and collection of debts, there are proper means of so doing: but a resort to threats and blackmail of the kind suggested in the above circular is, to my mind, neither honest, decent nor effective.—*The Mercantile Adjuster.*

QUERIES.

QUERY No. 10.

On May 25, 1877, M made to H a mortgage on real estate to secure three promissory notes of same date as mortgage, payable in one, two and three years after date, with interest. No steps to collect or foreclose until within the last year of the limitation on last note was ever made. The mortgage provides as follows: "And in default of any of the conditions of this mortgage or said notes, then the whole amount secured hereby shall at the option of mortgagee or assigns become due and payable." When would the whole of said debt become due and payable? Would the two first notes be barred, or would the clause quoted above in mortgage save them from the operation of the statute? Please cite authorities.

W. D. P.

HUMORS OF THE LAW.

SIR GEORGE ROSE had a friend who had been appointed to a judgeship in one of the colonies, and who, long afterwards, was describing the agonies he endured in the sea passage when he first went out. Sir George listened with great commiseration to the recital of these woes, and said, "It's a great mercy you did not throw up your appointment."—*Curiosities of the Law and Lawyers.*

A MISUNDERSTANDING existed between the commonwealth and a citizen of the realm, and an advocate with a Websterian brow and Clay head was protecting the interests of the citizen as against the exacting demands of the sovereign. Something had been said to the twelve good and true men about the *corpus delicti*. The scholastic advocate was fearful that justice might miscarry if, perchance, this should not be made clear to the men who held fate in their hands, for the moment, and assumed the task of adding to their stock of useful information by saying: "Gentlemen of the jury, I suppose you do not know what the *corpus delicti* is; well, it's the dead body of the corpse."

A certain suspect in a criminal trial before a justice, whose acquaintance with Blackstone would seem to be limited, having clearly established his innocence of the charge against him by an *alibi*, the prosecuting attorney remarked to the court:

"I think, your Honor, that this trial had better stop right here. The *alibi* has been fully established."

"I think so myself," replied his Honor, with an approving nod; and then summoning the prosecuting attorney to his side, he said, in a stage whisper which was only too audible throughout the court-room, "I say, what is the penalty for an *alibi*?"—*Harper's Magazine.*

Judge Richards, of Chicago, says: "I was once a justice in Bosque county, Texas, when a little man was brought in by a constable and two assistants for the offense of carrying two revolvers. I told him he must pay $25 and lose the weapons. At that the little fellow broke down and actually cried. Finally, with the tears streaming down his cheeks, he said: 'Oh, judge, jes let me bid 'em good-by. Ma gave 'em to me, an' I can't go without handlin' them jes once.' I consented, and the moment he got the weapons he straightened up and, leveling them, yelled: 'I'd like tew see the galoot as can get ma's pistols now. Now I'm a goin, on my journey.' Nobody tried to stop him."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACKNOWLEDGMENT BY MARRIED WOMAN.— Under the statutes in force in Kentucky in 1823, providing that a *feme covert* could convey her land only by a deed acknowledged on privy examination to have been freely and voluntarily executed by her, a deed purporting to convey her land is void where the certificate of acknowledgment is to the effect that the deed was acknowledged before the officer, and the wife, being examined apart from her husband, "freely and voluntarily relinquished her right of dower to the within-mentioned premises."—*Sutton v. Pollard*, Ky., 16 S. W. Rep. 126.

2. ADMINISTRATION BOND.—A probate judge, to whom

an administration bond is made payable, is not, upon a breach thereof "the person aggrieved," within the meaning of Code Ala., 1886, § 2575, providing for actions on official bonds by the person aggrieved.—*Williams v. Stoutz*, Ala., 9 South. Rep. 155.

3. ADMIRALTY—Attached Property.—Where a suit has been brought against one of two ship-owners, and property attached thereunder released before the name of the other owner is introduced, the suit must be regarded as against the original respondent only.—*National Board v. Melchers*, U. S. D. C. (Penn.), 45 Fed. Rep. 643.

4. APPEAL—Attorney's Fees.—Attorney's fees provided for in the note sued on, and included in the judgment of the circuit court as attorney's fees in that court, cannot be deducted from the judgment before comparison with the judgment appealed from.—*Groves v. Wiles*, Ind., 27 N. E. Rep. 309.

5. APPEAL—Bond—Dismissal.—Under Code Civil Proc. Cal. §§ 946, 965, providing that when appellant is an administrator, acting in another's right, or appeals from a judgment in proceedings had upon the estate, he need file no bond, an administrator who appeals from an order revoking his letters is not relieved from giving an appeal-bond, as such appeal is a personal matter, and not one in which the estate is interested.—*Erlanger v. Danielson*, Cal., 26 Pac. Rep. 505.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Payment by the assignee to a preferred creditor, as directed in the assignment, vests title in such creditor to the money so paid, though the assignment is, in an action afterwards begun, declared fraudulent as to creditors, where such preferred creditor has not participated in the fraud.—*Knower v. Central Nat. Bank*, N. Y., 27 N. E. Rep. 247.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS — Mortgage.—An instrument which provides for the immediate surrender of the property described to a trustee for creditors, with directions to him to proceed to sell it at private sale without delay, and to pay the debts, whether mature or not, in the order enumerated, as fast as funds can be realized from the sale, is an assignment for the benefit of creditors, and not a mortgage, notwithstanding it contains a defeasance clause.—*Charles F. Penzel, Co. v. Jett*, Ark., 16 S. W. Rep. 120.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences.—Three mortgages, payable on demand, given on the same day by an insolvent debtor to secure *bona fide* debts, which do not cover all of the debtor's property, do not constitute a common law assignment, and are not void under How. St. Mich. § 8739, which provides that all assignments commonly called "common-law assigments for the benefit of creditors" shall be void unless they are without preferences.—*Sheldon v. Mann*, Mich , 48 N. W. Rep. 573.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Usury.—Though in the yearly settlements between a debtor and creditor usurious interest was allowed, another creditor cannot, on that account, on the assignment of the debtor, object to the former creditor's receiving a dividend out of the assigned estate, unless the agreement to pay the usurious rate was part of a scheme to cheat and defraud creditors.—*In re Estate of Selser*, Penn., 21 Rep. Atl. 777.

10. ASSUMPSIT — Liability for Another's Debt. — The fact that a person marries the sister of the purchaser of property, assists in hauling the property away, and afterwards resides on the premises on which it is placed and used, does not make him liable for the purchase money.—*Womack v. Acuff*, Tex., 16 S. W. Rep. 107.

11. BASTARDY — Inspection of Child.—In a bastardy proceeding, misconduct of the jurors, after adjournment for the day, and before the verdict, in inspecting the countenance of the child, is cured by an instruction that they must not take the child's appearance into consideration in determinining whether defendant is its father.—*La Matt v. State*, Ind., 27 N. E. Rep. 346.

12. CARRIERS—Failure to Furnish Cars.—Where one represents a railroad company as station agent, and makes all contracts for shipment of live-stock, but is not authorized to agree to provide cars at specified times, and in fact has instructions forbidding him to do so, a contract for this purpose is nevertheless binding upon the company as within the apparent scope of his authority, unless the shipper knows of the limitation.—*Receivers v. Graves*, Tex., 16 S. W. Rep. 102.

13. CARRIERS OF GOODS—Damages.—A railroad company is not liable for damages for failure to deliver goods to an unidentified consignee, where he fails to produce the bill of lading, though he may offer security.—*Gulf, etc. R. Co. v. Freeman*, Tex., 16 S. W. Rep. 109.

14. CERTIORARI.—To review the judgment of a justice court for an amount exceeding $50, where no facts were in dispute, the writ of *certiorari* is a proper remedy.—*Greenwood v. Boyd & Baxter Furniture Factory*, Ga., 13 S. E. Rep. 128.

15. CERTIORARI—Failure to File Bond.—Where a petition for *certiorari* had been sanctioned by the judge and filed with the clerk of the superior court, but no bond as required by law was filed therewith, and consequently no writ of *certiorari* was issued, it was too late, after the expiration of the time allowed by law for obtaining the writ of *certiorari*, to file such bond —*Baker v. McDonald*, Ga., 13 S. E. Rep. 130.

16. CERTIORARI—When Lies.—The order of the circuit court appointing commissioners to determine the points and manner of crossings and connection of railways, and to assess the damages, is interlocutory, and cannot be reviewed by *certiorari*, which only lies in a case of a final order or judgment to determine the jurisdiction of the lower court.—*State v. Edwards*, Mo., 16 S. W. Rep. 117.

17. CHATTEL MORTGAGES — Bona Fide Purchasers. — Persons to whom goods have been transferred in consideration of a credit for their value on an existing indebtedness of the owner are not *bona fide* purchasers or mortgagees, as to whom an unfiled prior mortgage on the goods is invalid under Laws N. Y. 1883, ch. 279, § 1.—*Button v. Rathbone, Sard & Co.*, N. Y., 27 N. E. Rep. 266.

18. CHATTEL MORTGAGES—Sale — Estoppel.—Where a chattel mortgagee gives the mortgager permission to sell the mortgaged property, and stands by, and without setting up any claim, allows it to be sold to one having no actual notice of the mortgage, he will be estopped to deny the mortgagor's authority to sell.—*Benedict v. Farlow*, Ind., 27 N. E. Rep. 307.

19. CLERKS OF COURT—Terms of Office.—The terms of office of such clerks of the district court as, commencing in January, 1884, would terminate in January, 1888, were not affected by the amendments of the constitution adopted in 1883, but they continued to January, 1888, and the succeeding terms commenced at that time.—*State v. Steward*, Minn., 48 N. W. Rep. 603.

20. COMMON CARRIERS—Measure of Damages.—In case of shipment of an animal over a railroad, under a contract providing that, in case of loss, its market value at the point of destination shall be taken as liquidated damages for such loss, it is error, in an action for its death through the railroad company's negligence, to allow as damages a greater amount than the price for which the shipper has sold it to the consignee.—*Gulf, etc. Ry. Co. v. Key*, Tex., 16 S. W. Rep. 106.

21. CONFLICT OF LAWS—Contracts.—Application for a loan from a foreign corporation was made to its agent in Alabama, and the corporation paid the money to bankers in New York, who sent it to the agent, to be delivered to the borrower on execution by him of a note and mortgage on land in Alabama, which was done, and the money was there delivered. The mortgage recited that it was "made," and the acknowledgment was taken, in Alabama, but the notes were payable in New York: *Held*, that the contract was governed by the laws of Alabama.—*American Mortgage Co. v. Sewell*, Ala., 9 South. Rep. 143.

22. CONSTITUTIONAL LAW—Police Power.—Where the evidence shows that the stretching of electric wires

over and upon the roofs of buildings is extremely dangerous, both as being liable to originate fires and as obstructions to the extinguishment of fires otherwise originated, a city ordinance absolutely prohibiting the practice is a valid exercise of the police power.—*Electric Imp. Co. v. City and County of San Francisco*, U. S. C. C. (Cal.), 45 Fed. Rep. 593.

23. CONSTITUTIONAL LAW — Special Legislation.— Act Pa. June 14, 1887, "An act in relation to the government of cities of the second class," is not unconstitutional, as being a local act, by reason of its providing a time when it should go into operation as to the cities then of the second class, without making a similar provision for cities that should thereafter be entitled to come into the class.—*In re City of Pittsburgh*, Penn., 21 Atl. Rep. 759.

24. CONTRACT — Compensation for Indorsement.—To recover compensation for the use of one's name as an indorser there must at least be a proof of a contract therefor.—*Hoffeditz v. Maidencreek Iron Co.*, Penn., 21 Atl. Rep. 764.

25. CONTRACT—Damages.— It is the duty of a party who has suffered an injury from the non-performance of a contract to take reasonable measures to make the injury or damage for which he intends to hold the other party liable as light as possible.—*Halstead Lumber Co. v. Sutton*, Kan., 26 Pac. Rep. 444.

26. CONTRACT—Future Delivery.—A contract for the sale of stock at so much per share, to be delivered at the expiration of 12 months, with seller's option to deliver at any time during that period, is not void within Code Ala. § 1742, as founded on a gambling consideration, when the parties intended an actual delivery and sale at the maturity of the contract.—*Wolfe v. Perryman*, Ala., 9 South. Rep. 148.

27. CONTRACT—Quantum Meruit.—Where the building is erected upon and becomes a part of the realty of the defendant, and, although defective in some repects, is of real and substantial value to the defendant for the purposes intended, the plaintiff may recover from the defendant what the building is reasonably worth to him.—*School Dist. v. Boyer*, Kan., 26 Pac. Rep. 484.

28. CONTRACT—Rescission—Injunction.— In an action to rescind a contract for the purchase of real estate, the cancellation of the notes given in payment of such purchase, and to restrain the purchaser of said notes from collecting the same, an injunction should not be granted to restrain the purchaser of such notes from collecting the same if it appeared from the petition of the plaintiffs that they had a plain and adequate remedy at law.—*Hardy v. First Nat. Bank of Newton*, Kan., 26 Pac. Rep. 423.

29. CORPORATIONS.—Const. Ala. art. 14, § 4, prohibiting a foreign corporation from doing business in the State, without having an agent and known place of business in the State, was not intended to interfere with interstate commerce, and does not prevent a foreign corporation from selling a merchant of the State goods to be shipped into the State.—*Ware v. Hamilton Brown Shoe Co.*, Ala., 9 South. Rep. 136.

30. CORPORATIONS—Actions.— The appointment of a receiver for a corporation does not work a dissolution, and a pending suit may proceed to judgment, in the name of the corporation, for the benefit of one to whom the receiver has duly assigned the demand in suit.—*Hasselman v. Japanese Development Co.*, Ind., 27 N. E. Rep. 318.

31. CORPORATIONS—Service of Process.—Where a foreign corporation has a duly-appointed agent in the State, who has a place of business, on the inside walls of which is displayed a sign bearing the name of the corporation, and his own name as agent, and on the outside a sign bearing his name and business, and who is authorized to receive service of process binding the corporation, there is, in the absence of statutory enactments, a sufficient compliance with Const. Ala. art. 14, § 4, prohibiting a foreign corporation from doing business in the State without having a "known" place of business, and an authorized agent therein.—*New England Mortg. Security Co. v. Ingram*, Ala., 9 South. Rep. 140.

32. CORPORATIONS—Stockholders—Pledgee of Stock.—A pledgee of stock, who has the old certificates canceled and new certificates issued in his own name, is liable to creditors of the corporation as a stockholder.—*National Commercial Bank v. McDonnell*, Ala., 9 South. Rep. 149.

33. CRIMINAL LAW—Arson.— In the burning of her husband's barn a wife may be guilty of arson under Rev. St. Ind. 1881, § 1927, making it arson willfully and maliciously to burn any building occupied or unoccupied, the property so burned being of the value of $20, and being the property of another.—*Emig v. Daum*, Ind., 27 N. E. Rep. 322.

34. CRIMINAL LAW—Burglary.—Under an indictment charging that at night the accused did, by force, threats, and fraud, break and enter a house, and did, with malice aforethought, assault one A, with intent to murder, the accused can be convicted of an assault with intent to murder, but not of the crime of burglary, under Pen. Code Tex. art. 704.—*Hammons v. State*, Tex., 16 S. W. Rep. 99.

35. CRIMINAL LAW — Consenting to Commission of Crime.—A person consenting to a thing which is innocent in itself does not thereby commit a public offense although the thing may at the time appear to him to be a public offense, and although he may at the time believe the same to be a public offense.—*State v. Douglass*, Kan., 26 Pac. Rep. 476.

36. CRIMINAL LAW—False Pretenses.—In a prosecution for obtaining money under false pretenses, it is necessary for the State to prove the intent to defraud, the false pretenses made with the intent, and the fraud thereby accomplished must be shown, to warrant a conviction.—*State v. Clark*, Kan., 26 Pac. Rep. 481.

37. CRIMINAL LAW—Forgery.—An information which charges that defendant made out, swore to, and presented to the board of county commissioners of a certain county a claim against said county, which was allowed, and a warrant issued to him thereon, when said county did not owe him anything, is not guilty of forgery under § 115 of the crimes act.—*State v. Corfield*, Kan., 26 Pac. Rep. 498.

38. CRIMINAL LAW—Incest—Rape.—Under § 1873, Hill's Code, the crime of rape by forcible ravishment and incest cannot be committed by the same act. Rape is accomplished by the impelling will of one person, and incest by the concurrent assent of two.—*State v. Jarvis* Oreg., 26 Pac. Rep. 362.

39. CRIMINAL LAW—Rape — Resistance.—Where in a case of rape, no resistance by the prosecutrix is shown, and her fear of loss of life or great bodily harm is relied upon to supply the place of such resistance, as evidence of want of consent on her part, and her age is such that it is to be presumed that she was of an intelligent or understanding mind on the subject, and there is an entire absence of evidence to the contrary of such presumption, a new trial should be granted if the testimony is not such as to justify the jury in believing, beyond a reasonable doubt, that it was on account of such fear that she made no resistance.—*Hollis v. State*, Fla., 9 South. Rep. 67.

40. CRIMINAL PRACTICE—Bail.—Under Pen. Code Tex. arts. 798, 799, providing for the punishment of one who brings into this State, goods he has stolen in another State or territory, by the laws of which the act committed was theft, a recognizance is not valid which binds the accused to appear and answer to an indictment for the theft of a horse in the Indian Territory, and afterwards bringing the said horse into Cook county, State of Texas.—*Edwards v. State*, Tex., 16 S. W Rep. 98.

41. CRIMINAL TRIAL—Arguments of Counsel.—On the trial of an indictment for arson it was error to allow the solicitor general, over objection of defendant's counsel, to state in his concluding argument that fre-

quent burnings had occurred throughout the country, and to urge the jury, in consequence thereof, to strictly enforce the law in the case then on trial.—*Washington v. State*, Ga., 13 S. E. Rep. 131.

42. DECEIT—Sale—Latent Defect.— Where defendant induces plaintiff to buy a mule by representing that it is "all right," when in fact it has a disease of the eyes, as defendant knew, which will in time result in blindness, and which reduces its value one half, plaintiff will be entitled to recover for the deceit.—*Moncrief v. Wilkinson*, Ala., 9 South. Rep. 159.

43. DEED—Cancellation.—In an action by a vendor against a vendee to set aside a deed, a third party who, subsequent to the delivery of the deed sought to be set aside, but before the suit is brought therefor, obtains by written contract with the vendor an interest in the land described in said deed, which interest is contingent upon the success of the plaintiff's action to set aside the deed, but who is not a party to the suit, is not privy to the judgment therein obtained.—*Root v. Topeka Water Supply Co.*, Kan , 26 Pac. Rep. 400.

44. DEED—Fraud.—Where one who has through fraud and undue influence obtained a deed of land to himself, conveys the land to an innocent purchaser, he becomes liable to his grantor for the value of the land as a trustee *ex maleficio*.—*Valintine v. Richardt*, N. Y., 27 N. E. Rep 255.

45. DEED—Reformation.—A court of equity will, at the suit of the wife, reform a deed in which she joined her husband, where a provision reserving to her for life the rents and profits, which it was agreed should be inserted, has been omitted through the husband's fraud. —*Koons v. Blanton*, Ind., 27 N. E. Rep. 334.

46. DESCENT AND DISTRIBUTION—Deceased Wife's Estate.—Where a deceased wife leaves a chattel as her separate estate, and it is mortgaged by the husband and sold, her children cannot sue as distributees to recover it, since, the father being entitled to half the property under Code Ala. 1886, § 2353, they as distributees, are only part owners.—*Davenport v. Brooks*, Ala., 9 South. Rep. 153.

47. DIVORCE—Right of Wife in Homestead.—On the dissolution of a marriage by total divorce the wife ceases to be a member of the husband's family as effectually as if she were dead. She is therefore no longer a beneficiary of the homestead set apart in his property. Her right to use or enjoy the property as a homestead terminates with the expiration of the coverture. —*Burns v. Lewis*, Ga., 13 S. E. Rep. 123.

48. DRAINAGE—Hearing on Appeal.—In proceedings for the construction of a public ditch, where viewers were appointed, and reported first adversely to the petitioner, and subsequently, by order of the commissioners' court, met and reported in his favor, an objection, not raised before the board of commissioners, will not be heard on appeal in the circuit court.—*Budd v. Reidelbach*, Ind., 27 N. E. Rep. 349.

49. DRAINAGE—Organization. — The validity of proceedings to extend the boundaries of a drainage district cannot be questioned upon an application for judgment for a delinquent drainage assessment.—*People v. Jones*, Ill., 27 N. E. Rep. 294.

50. EJECTMENT—Indians— Descent.—Where a plaintiff relies upon title to real estate alleged to be cast by descent upon his grantor in accordance with the custom and decision of an Indian tribe, he must establish the custom or decision of the tribe as to descent or distribution at the time of the death of the former owner or possessor, from whom he claims his grant or inherited the property.—*O'Brien v. Bugbee*, Kan., 26 Pac. Rep. 428.

51. ELECTIONS—Judges—Compensation.—Rev. St. Ill. 1889, ch. 46, § 273, which provides that judges of election shall be paid $3 per day, does not entitle them to such pay when acting as judges at a primary election held by a voluntary political party under the Illinois "Primary Election Law" of 1889.—*Shiel v. Cook County*, Ill., 27 N. E Rep. 293

52 ELECTIONS OF CONGRESSMEN—Federal Laws—Inspection of Ballots —The laws of the United States concerning elections at which congressmen are elected paramount, and Mansf. Dig. Ark. § 2694, providing that "the judges of election shall securely envelop all the ballots which may have been received under seal, and return the same to the clerk of the proper county, which shall in no event be opened except in case of a contested election," cannot be held to justify the refusal of the clerk to produce the ballots before the grand jury of the United States, pending an investigation into alleged violations of federal election laws.—*In re Massey*, U. S. D. C. (Ark), 45 Fed. Rep. 629.

53. EXEMPTIONS—Joinder—Contract and Tort.—In an action to set aside a sheriff's sale of land, it appeared that plaintiff recovered a judgment upon a complaint uniting two causes of action in tort with one on contract: *Held*, that defendant is entitled to treat the judgment as one rendered upon contract, and to claim his exemption.—*Ries v. McClatchey*, Ind., 27 N. E Rep. 349.

54. FRAUDULENT CONVEYANCE—Mortgage.—A provision that the mortgagee is to take possession of the goods, and convert them into cash "as soon as possible, consistent with the most profitable disposition that can be, under the circumstances, made in the premises," is not fraudulent *per se*, as putting the property out of the reach of creditors for an indefinite time, but is only evidence of fraud to be left to the jury.—*Reynolds v. Johnson*, Ark., 16 S. W. Rep. 124.

55. GIFTS INTER VIVOS—Delivery.—A writing signed and delivered recited: "I give to the trustees," etc., "the principal of a note for seven hundred dollars, said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due." The note was not delivered. *Held*, that there was no gift *inter vivos*, but merely an agreement to give when the note became due.—*Gammon Theological Seminary v. Robbins*, Ind., 27 N. E. Rep. 341.

56. GUARDIAN AND WARD—Limitation of Actions.—A suit to set aside a guardian's final report brought by the guardian of the deceased ward's minor heir, is barred if there was an administrator of the deceased ward who could have brought suit six years before.—*Horton v. Hastings*, Ind., 27 N. E. Rep. 338.

57. HABEAS CORPUS—When Lies.—Under Rev. St. Mo. 1889, § 5376, a prisoner sentenced by the circuit court for selling liquor contrary to the local option law will not be released on *habeas corpus*, on the ground that the county in which the offense was committed never legally adopted the law, as that was a matter determinable by the trial court, and reviewable by appeal.—*In re Mitchell*, Mo., 16 S. W. Rep. 118.

58. HOMESTEAD — Rights of Widow and Children. — Where real estate is occupied by a man and his family as a homestead at the time of his death, and afterwards by his widow and children, and the widow marries again, the homestead may be partitioned between her and the children.—*Brady v. Banta*, Kan., 26 Pac. Rep. 441.

59. HUSBAND AND WIFE—Desertion by Husband. —A wife, whose husband has deserted her, and fails to provide for her and her children's support, has the right to cause the land left in her possession to be cultivated, and to use so much of the crop as may be necessary for such support, and her rights are superior to those of a chattel mortgagee of her husband with notice of the circumstances.—*Loy v. Loy*, Ind., 27 N. E. Rep. 351.

60. INJUNCTION—Restraining Levy of Execution.—The execution issued by the court which rendered the judgment to enforce payment cannot be arrested by any other court at the instance of the defendant in the suit. —*Arthurs v. Villere*, La., 9 South. Rep. 126.

61. INJUNCTION—Verification.—In an action for an injunction it is not necessary that the petition should be be sworn to, if the application upon which the injunction is asked is properly verified.—*State v. Loomis*, Kan., 26 Pac. Rep. 471.

62. INSURANCE—Proofs of Loss.—Waiver.—Where a fire insurance policy was issued by an insurance company, and afterwards the insured property was destroyed by fire, and the company then denied all liability on the ground that the policy void, *held*, that by this denial the company in effect waived all its rights under certain stipulations in the policy requiring proofs of loss to be made, and giving the company 60 days thereafter within which to pay the loss.—*Phenix Ins. Co. v. Weeks*, Kan., 26 Pac. Rep. 410.

63. INSURANCE—Warranties.—Although Civil Code Cal. § 2706, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," yet, where it appears from the whole policy that such an expression was not intended as a warranty, it will not be held to be such.—*National Bank of D. O. Mills & Co. v. Union Ins. Co.*, Cal., 26 Pac. Rep. 509.

64. INTOXICATING LIQUORS—"Giving" or "Selling" to Minor.—On indictment for selling or giving intoxicating liquors to a minor the minor testified that he sought to buy whisky from defendant, who told him he had none for sale; that he then borrowed some, and afterwards, not having any whisky, handed defendant money, asking him to buy as much whisky as he had borrowed. *Held*, that it was error to charge that the transaction was a "giving" or "selling," in violation of the statute.—*Coker v. State*, Ala., 8 South. Rep. 874.

65. JUDGMENT.— Plaintiff obtained judgment against defendant in a Tennessee justice court. Defendant, after appealing to the circuit court, dismissed his appeal, and the court confirmed the justice's judgment. Plaintiff then dismissed his case. In Tennessee an appeal from a justice court vacates the judgment. The amount of the judgment was paid by defendant to the circuit court clerk. But it does not appear that the clerk was the proper party to receive it, or that it was ever paid to plaintiff. *Held*, in an action in Georgia, that a plea in abatement of prior judgment which had been satisfied was property overruled.—*Chattanooga R. & C. R. Co. v. Jackson*, Ga., 13 S. E. Rep. 109.

66. LANDLORD AND TENANT—Crop Lien.—Money advanced by a landlord to his tenant for the purpose of enabling the tenant to make the necessary annual repairs on the farm comes within the statute of Arkansas providing for a landlord's lien to secure money advanced to enable the tenant to make the crop, and such lien is prior to a mortgage of the crop by the tenant.—*Airey v. Weinstein*, Ark., 16 S. W. Rep. 123.

67. LANDLORD'S LIEN — Surety for Tenant.—A landlord having, as surety with his tenant and another person, signed a note for supplies purchased by the tenant, but not having purchased or ordered them himself, cannot have a lien therefor on the tenants crop, though he is obliged to pay the note at its maturity.—*Brimberry v. Mansfield*, Ga., 13 S. E. Rep. 132.

68. LEASE— Surrender — Assault.—Where the lessee, after the surrender and termination of a lease, denies the lessor's right to peaceable entry and possession, and attempts to expel him by force, this is an unlawful assault, and the lessor is justified in resisting it with sufficient force to repel the same.—*Gillespie v. Beecher*, Mich., 48 N. W. Rep. 561.

69. LIEN — Subrogation. — Where the owner of land conveys it in consideration that the grantee shall for the balance of his life board, nurse, and take proper care of him, he has a lien on the land for necessary medical services which he procures to be rendered him on the grantee's failure to do so, and one who renders such services will be subrogated to the grantor's rights.—*Hufmond v. Bence*, Ind., 27 N. E. Rep. 347.

70. LOTTERIES—Sale of Ticket—Regulations.—The defendant had the right to adopt reasonable and appropriate rules for the management of its complicated business, and to conduct the same in accordance therewith.—*Collins v. Louisiana State Lottery Co.*, La., 9 South Rep. 27.

71. MANDAMUS—Injunction.—Where a judge has issued an injunction against a gas company to prevent its shutting off the gas from petitioner's works in accordance with an order of the supreme court, *mandamus* will not lie to compel him to extend it to the sheriff to prevent him from levying an execution on defendant's property and shutting off the gas.—*Whiteman v. Fayette Fuel Gas Co.*, Penn., 21 Atl. Rep. 773.

72. MANDAMUS TO JUDGE.—*Mandamus* will not lie to compel a judge to vacate an order setting aside an agreed statement of facts on motion of one of the parties thereto. The ruling must be reviewed on appeal from final judgment.—*Ex parte Hayes*, Ala., 9 South. Rep. 156.

73. MANDAMUS TO MUNICIPAL OFFICERS. The writ of *mandamus* will not be issued to compel the presiding officer of the common council of a city to declare lost a resolution authorizing a contract, which he has declared carried, where the resolution shows on its face that it is illegal, since all persons are chargeable with notice of its illegality, and no injury can be sustained nor liability incurred under it.—*Tennant v. Crocker*, Mich., 48 N. W. Rep. 577.

74. MARRIED WOMEN—Free Traders.—The power of a married woman to contract as a free trader, under section 1760 of the Code, is restricted by the general provision of section 1783 as to all married women, which disables them to bind their separate estate by any contract of suretyship.—*Madden v. Blain*, Ga., 13 S. E. Rep. 128.

75. MEASURE OF DAMAGES— Exemplary Damages.—Whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages, followed.—*Cady v. Case*, Kan., 26 Pac. Rep. 448.

76. MECHANICS' LIENS—Pleading.—Where, in a case for the foreclosure of a lien for material furnished, there is no allegation on the body of the petition that the contract to furnish materials was with the owner, but the petition refers to the lien statement as attached thereto, and as a part thereof, and said lien statement clearly shows the contract to furnish material was with the owner: *Held*, that the petition sufficiently shows that the contract was with the owner.—*Jarvis Conklin Mortgage Trust Co. v. Sutton*, Kan., 26 Pac. Rep. 406.

77. MORTGAGES— Foreclosure — Report of Master.—Though the statute requires the master to whom a case is referred to reduce to writing and to return to court the testimony of all the witnesses examined by him, yet where a party attends the taking of testimony, and makes no objection to the manner of doing it, it is too late after the report is made to object that the evidence was not taken in the manner prescribed.—*Johnson v Meyer*, Ark., 16 S. W. Rep. 121.

78. MUNICIPAL AID BONDS.—In 1881 a city of the third class had the power, under certain terms and conditions, and within certain limitations, to subscribe to the capital stock of a railroad company, and to issue its bonds in payment for the stock, although the city may have been a portion of a municipal township, which township had already subscribed for all the stock and issued all the bonds in aid of railroads which it had the power to subscribe for or issue.—*City of Iola v. Merriman*, Kan., 26 Pac. Rep. 485.

79. MUNICIPAL CORPORATIONS — Change of Street Grade.—Where a city of the first class changes the grade of one of its streets, an abutting lot-owner will be entitled, under the statutes, to any damage which he may suffer thereby.—*Parker v. City of Atchison*, Kan., 26 Pac. Rep. 435.

80. MUNICIPAL CORPORATIONS—City Council.—To disqualify a member of a city council from voting on the passage of an ordinance establishing a sewer district, it must appear that he has a pecuniary interest in the measure adverse to that of the city.—*City of Topeka v. Huntoon*, Kan., 26 Pac. Rep. 488

81. MUNICIPAL CORPORATIONS—Defective Sidewalks.—

In an action against a city for injuries resulting from a defective sidewalk, where the accident happened at night, and it appears that the same defect existed for some time before the accident, a witness who did not examine the sidewalk until the morning after the accident may testify as to its condition.—*Shippy v. Village of Au Sable*, Mich., 48 N. W. Rep. 584.

82. MUNICIPAL CORPORATIONS—Grade of Streets.—A city has the right to establish the grade of its streets, and it is only when the grade is changed after being once established that damages can be allowed therefor to property owners. — *Interstate Consolidated Rapid Transit Ry. Co. v. Early* Kan., 26 Pac. Rep. 422.

83. MUNICIPAL CORPORATIONS—Street—Use by Railroads.—A municipal corporation, vested by law with control over its streets, is bound to keep the same in good order and condition, sufficiently safe to prevent injury to travelers thereon. It may grant to a railroad company the privilege of building its tracks and running its cars thereon, with the obligation of keeping them in proper order and condition.—*Cline v. Crescent City R. Co.*, La., 9 South. Rep. 122.

84. MUNICIPAL CORPORATIONS—Street Assessments.—While Act Pa. April 1, 1870, § 6, may be broad enough to cover railroad property, yet it does not apply to the road-bed of a railroad, since the constitutionality of assessments for street improvements can only be sustained on the ground that the property assessed is benefited by the improvement, and the road bed of a railroad company is conclusively presumed not to be benefited thereby.—*City of Allegheny v. Western Pennsylvania R. Co.*, Penn., 21 Atl. Rep. 763.

85. MUNICIPAL CORPORATIONS—Street Assessments.—Where a city of the second class has made certain street improvements, and has undertaken others under the Street Acts Pa. 1887 and 1889, when such acts and board are declared unconstitutional, viewers to ascertain damages and assess benefits for such improvements cannot be appointed under the street act of 1864 and its supplements, as the proceedings preliminary to the improvements under the two systems are radically different. — *Appeal of City of Pittsburgh*, Penn., 21 Atl. Rep. 761.

86. MUTUAL BENEFIT INSURANCE—Garnishment.—No part of the fund set apart or appropriated in accordance with the rules, regulations, and by-laws of either of the societies or associations enumerated in Gen. St. 1878, ch. 34, § 368, or by any society or association similar thereto, to be paid over to the family of a deceased member, can be seized or appropriated by legal process to satisfy a debt due from a member of the family, or from the society or organization itself.—*Brown v. Balfour*, Minn., 48 N. W. Rep. 604.

87. NEGLIGENCE—Exemplary Damages.—In an action to recover damages for personal injuries, the negligence established must be wanton, willful, or malicious, to justify punitive or exemplary damages.—*Atchison, etc. R. Co. v. McGinnis*, Kan., 26 Pac. Rep. 453.

88. NEGLIGENCE—Malpractice.—In an action for malpractice against physicians and surgeons to recover damages for an alleged unskillful and negligent operation upon the plaintiff's eye, which resulted in injury and disease, the plaintiff must affirmatively prove that the injury and disease were produced by the operation, and that the defendants did not exercise ordinary skill and care in performing the operation.— *Pettigrew v. Lewis*, Kan., 26 Pac. Rep. 458.

89. NEGOTIABLE INSTRUMENT—Bona Fide Purchaser.—One who for an individual debt of a guardian takes from him an assignment of notes which he knows belong to to the ward, acquires no title, and such facts constitute a good defense by the maker to an action on the notes.—*Mathis v. Barnes*, Ind., 27 N. E. Rep. 308.

90. NEGOTIABLE INSTRUMENT — Pleading.—Where, in an action by an indorsee of a negotiable promissory note, payable to order, the plaintiff declares on such note by setting out a copy of the same, with all the indorsements, and alleges ownership, and the indorsements are without date, the presumption of the law is that such note was transferred before maturity, and that plaintiff is the *bona fide* holder for value.—*First Nat. Bank of Fort Scott v. Elliott*, Kan., 26 Pac. Rep. 487.

91. NOVATION.—A person for whose benefit a promise to another, upon a sufficient consideration, is made, may bring an action in his own name on the contract against the promisor, but he cannot be compelled to act upon or accept such contract.—*Howell v. Hough*, Kan., 26 Pac. Rep. 436.

92. NUISANCE.—A carpet-cleaning establishment and stable upon premises in a thickly-settled neighborhood or private residences are nuisances, when it appears that the dust and moths from the carpet cleaner and the stench and noises from the stable permeate the neighboring houses, and disturb the inmates.—*Craven v. Rodenhausen*, Penn., 21 Atl. Rep. 774.

93. NUISANCE—Hearing.—An action to abate a mill-dam for the reason that it causes injury to the property of an upper proprietor is an action to abate a nuisance, and is an equitable remedy, and the trial may be before the court, or before a jury, or before a referee, or a part before one and a part before another, as the court, in its discretion, may determine.—*Drinkwater v. Sauble*, Kan., 26 Pac. Rep. 433.

94. OFFICE AND OFFICERS—Holding two Offices.—In this State a person holding a city office cannot hold at the same time the office of county commissioner.—*State v. Plymell*, Kan., 26 Pac. Rep. 479.

95. OFFICER—Defalcation—Successor.—Where an officer becomes a defaulter, flees the State, leaves no one to care for the public affairs, and indicates a settled purpose to abandon the offices, it may be deemed vacant without a judicial determination, so that sureties of the defaulting officer cannot challenge the right of a person appointed to fill the abandoned office to prosecute an action for the recovery of the public money.—*Osborne v. State*, Ind., 27 N. E. Rep. 845.

96. OFFICERS—Removal — Compensation. — A public officer, unlawfully removed from office, to which another is appointed, who acquiesces in his removal, and has not by *certiorari* or otherwise, obtained a reversal of such order, or a reinstatement in the vacated term, cannot recover the compensation incident to the office, accruing while he rendered no service.—*Hagan v. City of Brooklyn*, N. Y., 27 N. E. Rep. 265.

97. PARTNERSHIP—Guaranty.—A firm doing business under the individual name of one of the partners may sue on a written guaranty purporting to run to such partner individually, where it appears that the guarantor knew of the firm's existence when he gave the guaranty, and intended it for their benefit.—*Beakes v. Da Cunha*, N. Y., 27 N. E. Rep. 251.

98. PLEADING—Defect of Parties.—A defect of parties should be raised either by answer or demurrer, and, when not so taken advantage of, is usually waived.—*Hurd v. Simpson*, Kan., 26 Pac. Rep. 465.

99. PLEADING — Misjoinder of Causes. — Where the sureties on two bonds given by a defaulting county treasurer agreed to divide the loss equally, and some of them paid the debt, and sued the others jointly for contribution, the question whether the liability is joint, or joint and several, or several only, must be raised by demurrer for misjoinder of causes of action.—*Carnahan v. Chenoweth*, Ind., 27 N. E. Rep. 332.

100. PRACTICE—Continuance.—An affidavit supporting a motion for continuance on account of the absence of a material witness must show that the party has been sufficiently diligent in his efforts to obtain the witness. It must set forth specific acts of diligence, such as search and inquiry. It is not enough that the party alleges that he made diligent inquiry, without stating how, where, and of whom he inquired.— *Struthers v. Fuller*, Kan., 26 Pac. Rep. 471.

101. PRINCIPAL AND AGENT—Evidence.—When a corporation carries on the business of buying and shipping grain through an agent, and the authority of such agent

to purchase grain in wagon loads lots upon inspection is conceded, it is competent to introduce evidence to show the inspection and purchase of grain by such agent, to determine the scope and authority of his agency, and to ascertain whether the purchase of certain grain sued for was within the fair scope of his authority as the agent of such corporation.—*Cain Bros. Co. v. Wallace*, Kan., 26 Pac. Rep. 445.

102. PRINCIPAL AND AGENT—Transactions with Agent.—If one deals *bona fide* with an agent as owner, without knowledge of his agency, and has no good reason to know of such agency, he is justified in treating the agent as the owner, and the payment of the purchase price to him with a pre-existing debt will be a defense to an action by the owner for the value of the goods and merchandise.—*Tripp & Moore Boot & Shoe Co. v. Martin*, Kan., 26 Pac. Rep. 424.

103. PROCESS—Service—Return.—The return of an officer serving process is insufficient under Rev. St. Tex, art. 1219, unless it shows that a true copy thereof was delivered to each one of the several defendants named therein.—*Rutherford v. Davenport*, Tex., 16 S. W. Rep. 112.

104. PUBLIC LANDS—Riparian Rights.—Where the government conveys land on the bank of a navigable stream without reservation, the land over which the stream flows, as far as the middle line of the stream, and all unsurveyed islands between this line and the bank, pass by the grant, and the riparian owner cannot be divested by a subsequent survey and grant of the islands.—*Butler v. Grand Rapids & I. R. Co.*, Mich., 48 N. W. Rep. 569.

105. PUBLIC LANDS—Swamp.—Const. Cal. art. 17, § 3, providing that State lands which are "suitable for cultivation" shall be granted only to actual settlers, and in quantities not exceeding 320 acres to each settler, applies to swamp lands granted to the State by Act Cong. Sept. 28, 1850, when such lands are "suitable for cultivation," and can be reclaimed and cultivated by an actual settler.—*Fulton v. Brannan*, Cal., 26 Pac. Rep. 506.

106. RAILROAD COMPANIES.—Where, in the limits of a town but not at a public crossing one attempts to cross a railroad track immediately in front of a moving train, which he sees, he is guilty of contributory negligence, and cannot recover, though the train is running at an unreasonable speed. — *Craddock v Louisville & N. R. Co.*, Ky., 16 S. W. Rep. 125.

107. RAILROAD COMPANIES — Accident at Crossing.—Where a railroad company stops its train within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, attempts to take hold of the brake-ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts jerks him off, so that he falls under the wheels, and is injured, and the trainmen have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence towards the boy as to render it liable for damages on account of such injury.—*Atchison, etc. R. Co. v. Plaskett*, Kan., 26 Pac. Rep. 401.

108. RAILROAD COMPANIES—Carriers—Pleading.—In a suit for an injury to a horse resulting from the negligence of a railroad company in maintaining a highway crossing, contributory negligence is sufficiently negatived by an averment that the plaintiff has no knowledge of the dangerous conditon of the crossing, and the injury occurred without his fault.—*O. M. R. Co. v. Hawkins*, Ind., 27 N. E. Rep. 331.

109. RAILROAD COMPANIES—Killing Stock. — The fact that part of a railroad's main line is situated within a city, and within the road's "switch limits," does not relieve the company from the statutory duty of fencing its line at that point, where the nearest objects are a building 175 feet to the north, a crossing 175 feet to the south, and a yard track parallel to the main track, and 60 feet east of it, and the ground between those points is unoccupied.—*Jeffersonville, etc. R. Co. v. Peters*, Ind., 27 N. E. Rep. 299.

110. RAILROAD COMPANIES—Killing Stock.—Under Rev St. Wis. § 1810, as amended by Laws 1881, ch. 193, a company is liable when stock is killed on its unfenced track, and there is no evidence that the owner drove them on the right of way or abandoned them in a place where it was certain they would go on the track.—*Heller v. Abbott*, Wis., 48 N. W. Rep. 599.

111. RAILROAD COMPANIES — Killing Stock — Farm Crossings.—A land-owner whose farm is divided by a railroad is entitled to necessary crossings; and where the railroad company fences its track through his farm, and constructs gates in the fences at such crossings for the accommodation of the land-owner or his tenant, the duty rests upon him to keep the gates closed, and, if he neglects to do so, and his animals pass through them upon the track and are killed, without the negligence of those operating the trains, the railroad company is not liable for the loss.—*Adams v. Atchison, etc. R. Co.*, Kan., 26 Pac. Rep. 439.

112. REAL ESTATE AGENT—Commission.—A land-agent or broker, becomes entitled to his commission for selling the land if he procures for his principal a party with whom he is satisfied, who enters into a written contract with such principal to buy the real estate at the specified price, and is financially able to perform the conditions of the contract, although the principal, having the option by the contract to declare a forfeiture thereof if the installments are not paid in accordance with its terms, declares the contract forfeited on account of the non-payment of an installment when it becomes due.—*Betz v. Williams & White Land & Loan Co.*, Kan., 26 Pac. Rep. 456.

113. REPLEVIN — Goods Fraudulently Obtained. — Where goods were purchased with a design not to pay for them, the seller can recover the goods from a mortgagee with notice of facts sufficient to put a prudent man on inquiry, which, if prosecuted with reasonable diligence, would have led to a discovery of the fraud.—*Mahoney v. Gano*, Ind., 27 N. E. Rep. 315.

114. REPLEVIN—Pleading.—In replevin, an allegation in the complaint that defendant "unlawfully holds" the property is equivalent to an allegation that it is "unlawfully detained," within the meaning of Rev. St. Ind. 1881, § 1547.—*Gould v. O'Neal*, Ind., 27 N. E. Rep. 307.

115. SALE—Chattel Mortgage.—Under Sayles' Civil St. Tex. art. 3190a, a written contract for sale of a chattel duly recorded, and reciting that the chattel shall remain the property of the seller until the price is paid, constitutes a chattel mortgage, and the lien follows the chattel in the hands of the purchaser thereof at an attachment sale.—*Garretson v. DePoyster*, Tex., 16 S. W. Rep. 106.

116. SALE OF CHATTELS—Declarations of Vendor.—The declarations of a vendor of personal property as to his possession and title, when he is not in the actual possession of the property, are not admissible to affect the title of his grantees.—*Hoy v. Griggs*, Kan., 26 Pac. Rep. 468.

117. SALE OF LAND — Fraudulent Representations.—Where a party who claims to possess a right to a timber-culture claim under the laws of the United States, and to own and control the relinquishment of the same, fraudulently misrepresents the location and quality of the land to one who, relying upon his representations, purchases and pays for his relinquishment and right, such purchaser is entitled to recover the damages actually sustained.—*Davis v. Jenkins*, Kan., 26 Pac. Rep. 459.

118. SCHOOLS—Contracts—De Facto Officers.—Where school trustees, with the acquiescence of the school town, continue to act as such after the expiration of their term, and before their successors are appointed, they are officers *de facto*, and a contract with a teacher entered into by them is binding on the town.—*School Town of Milford v. Zeigler*, Ind., 27 N. E. Rep. 303.

119. SET OFF—When Allowed.—Where a railroad company has an agreement by which its employees can, at their option, on being injured, receive treatment at a hospital, the charges to be paid by the company, and

deducted from their wages, the company can set off the charges so incurred by an employee against wages due him at his death, and allotted by the court to his widow for her year's support.—*Louisville, etc. Ry. Co. v. Kennedy*, Tenn., 16 S. W. Rep. 113.

120. SHIPPING—Passenger Regulations. — Under Rev. St. U. S. § 4499, providing that vessels violating the law relating to the carrying of passengers "may be seized and proceeded against by way of libel," in the district court, such court has no jurisdiction until there has been a seizure of the vessel.—*United States v. The Frank Silvia*, U. S. C. C. (Cal.), 45 Fed. Rep. 641.

121. SPECIFIC PERFORMANCE— Agreement to Convey Land.—In an action to compel the specific performance of an agreement to convey real estate, a complaint alleging such an agreement, without stating whether it was written or oral, and alleging also such a part performance as would take an oral agreement out of the statute of frauds, is sufficient to justify the relief sought, upon proof of a partly performed oral agreement.—*Slingerland v. Slingerland*, Minn., 48 N. W. Rep. 605.

122. SWAMP LANDS—Segregation.—The swamp lands granted to the State by Act Cong. Sept. 28, 1850, are not subject to application for purchase until they have been segregated to the State by a United States survey, and an application filed prior to such segregation confers no rights on the applicant, though it is subsequently approved, and a certificate of purchase issued after segregation.—*Buchanan v. Nagle*, Cal., 26 Pac. Rep. 512.

123. TAXATION—Constitutional Law—Discriminations. —The article of the State constitution which provides that all property shall be assessed at a uniform rate is violated when it is shown that assessing officer assess in any considerable amount property at one-third or one-half, and other property at two-thirds, of its cash value. National banks, like any other tax payer against whom discriminations are made, are entitled to the protection of articles cited.—*First Nat. Bank v. Lindsay*, U. S. C. C. (La.), 45 Fed. Rep. 619.

124. TAXATION — Enjoining Sale. — Where lands had been returned for non-payment of taxes, and plaintiff enjoins the sale of the premises under the supposition that the lands were illegally assessed, and upon trial it appears that a portion of the lands were properly assessed, the court will enter a personal decree compelling him to pay such taxes as are found legal, and enforce such decree by execution.—*Tisdale v. Auditor General*, Mich., 48 N. W. Rep. 568.

125. TAXATION — Exemptions.— While lands actually used to carry on the business of a company organized under the general corporation act. Pa. 1874, for the supplying of pure water, and indispensably necessary for its operation, are not taxable for local purposes, large tracts of land owned by the company, lying along the stream, used for supplying water, and held for fear nuisances might be erected thereon, are not exempt.—*Roaring Creek Water Co. v. Girton*, Penn., 21 Atl. Rep. 780

126. TAXATION OF NATIONAL BANKS.—The assessment of the entire capital stock of a national bank "*in solido*, against the bank itself is invalid.—*First Nat. Bank of Leoti v. Fisher*, Kan., 26 Pac. Rep. 482.

127. TAX EXECUTION—Payment.—Unless a tax execution paid off by one not a party to it is entered on the execution docket of the superior court, as required by section 891a of the Code, within 30 days after the transfer, it has no longer any force except as against the defendant only.—*Wilson v. Herrington*, Ga., 13 S. E. Rep. 129.

128. TELEGRAPH COMPANIES—Delay.—Under a stipulation that "the company will not be liable for damages in any case when the claim is not presented in writing within 60 days after sending the message," the time runs from the transmission of the message, and not from its receipt by the company, and, when suit is brought within 60 days, no claim need be presented.—*Western Union Tel. Co. v. Trumbell*, Ind., 27 N. E. Rep. 313

129. TOWNSHIPS—Assets — City Formed from Township.—When small portions of an original township are from time to time detached to aid in the formation of new townships, the portion of the original township thus detached, in the absence of legislative provisions to that effect, retain no interest in or claim to the public property of the original township not situate in any of the portions detached.—*City of Wellington v. Township of Wellington*, Kan., 26 Pac. Rep. 415.

130. TRIAL—Misconduct of Jury.—A conviction will not be reversed because it appears from affidavits that one of the jurors drank intoxicating liquor during the trial, and that during a recess of court he was intoxicated, when counter affidavits by the other jurors, and the officer in charge of the jury, show that the juror was rational and sober at all times while hearing the trial and deliberating on the verdict.—*People v. Deegan*, Cal., 26 Pac. Rep. 500.

131. TRUSTS—Res Adjudicata.—An action by a trustee against the executor of a deceased trustor for an accounting and to recover the trust fund is a bar to a subsequent action for an accounting against the executor by the next of kin of a deceased beneficiary in the trust, though neither the beneficiary nor plaintiff were parties to the first action.—*In re Straut's Estate*, N. Y., 27 N. E. Rep. 259.

132. VENDOR AND VENDEE—Failure of Title—Purchase Money.—Where title to land fails, recovery of the purchase money can be had on a parol agreement made at the time of the sale to refund in case of such failure, as such agreement was not merged in a deed thereafter given containing the usual covenants of special warranty, but no covenant of title.—*Close v. Zell*, Penn., 21 Atl. Rep. 770.

133. VENUE—Change— Execution. — A motion, after notice to the adverse party, for leave to issue execution on a judgment after the lapse of ten years, is a civil action, within the meaning of Rev. St. Ind. 1881, § 412.—*Joseph v. Schnepper*, Ind., 27 N. E. Rep. 305.

134. WAY—Easement.—The owner of land opened and maintained a private way from one part of his land over another part to the highway, and the way was necessary for access to the land. After his death, on partition, the part of the land on the highway was allotted to his widow, and the balance was sold by order of the court: *Held*, that the purchaser took an easement in the road.—*Ellis v. Bassett*, Ind., 27 N. E. Rep. 344.

135. WIFE'S SEPARATE ESTATE—Separation.—A husband who paid for land with his own money, and took a conveyance in 1881, describing himself in the deed as trustee for his wife, acquired the property for her, and it became her separate estate, both legally and equitably.—*Payton v. Payton*, Ga., 13 S. E. Rep. 127.

136. WILL—Construction.—A testator left his residuary estate in trust, one half the income to be paid to his sister and one-half to his brother. On the death of either his share of the income was to be paid to his children, and on the death of both the fund was to be divided among their children. The brother died without issue after the testator: *Held*, that the fund should not thereupon be distributed, but that the brother's share of the income should during the sister's life be paid to the testator's heirs as intestate estate.—*In re De Silver's Estate*, Penn., 21 Atl. Rep. 753.

137. WILLS—Olographic.—The olographic, like every other testament, is a solemn act, depending for its validity upon compliance with the forms prescribed by law; and, however clearly it appears that the decedent intended the instrument to be her will, if it is not clothed with the forms prescribed it cannot stand.—*In re Armant's Will*, La., 9 South. Rep. 50.

138. WITNESS—Husband and Wife.—In Tennessee, a wife is not a competent witness for her husband in criminal cases; the common law rule not having been changed by statute.—*Owen v. State*, Tenn., 16 S. W. Rep. 114.

INDEX-DIGEST

TO THE EDITORIALS, NOTES OF RECENT DECISIONS, LEADING ARTICLES, ANNOTATED CASES, LEGAL NEWS, CORRESPONDENCE AND BOOK REVIEWS IN VOLUME 32.

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SUBJECT-INDEX

TO ALL THE "DIGEST OF CURRENT OPINIONS" IN VOL. 32.

This subject index will, we trust, be found convenient and satisfactory. It contains a reference *under its appropriate head* to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head, for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.